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In denying the existence of any assignable bounds to the supreme power, I added,* "unless where limited by express convention:" for this exception I could not but subjoin. Our Author, indeed, in that passage in which, short as it is, he is the most explicit, leaves, we may observe, no room for it. "However they began," says he (speaking of the several forms of government) — "however they began, and by what right soever they subsist, there is and must be in ALL of them an authority that is absolute....." To say this, however, of *all* governments without exception; — to say that *no* assemblage of men can subsist in a state of government, without being subject to some *one* body whose authority stands unlimited so much as by convention; — to say, in short, that not even by convention can any limitation be made to the power of that body in a state which in other respects is supreme, would be saying, I take it, rather too much: it would be saying that there is no such thing as government in the German Empire; nor in the Dutch Provinces; nor in the Swiss Cantons: nor was of old in the Achæan league.

XXXV. In this mode of limitation I see not what there is that need surprise us. By what is it that any degree of *power* (meaning *political power)* is established? It is neither more nor less, as we have already had occasion to observe,† than a habit of, and disposition to obedience: *habit*, speaking with respect to *past* acts; *disposition*, with respect to *future*. This disposition it is as easy, or I am much mistaken, to conceive as being absent with regard to one sort of acts, as present with regard to another. For a body, then, which is in other respects supreme, to be conceived as being with respect to a certain sort of acts limited, all that is necessary is, that this sort of acts be in its description distinguishable from every other.

XXXVI. By means of a convention, then, we are furnished with that common signal which, in other cases, we despaired of finding.‡ A certain act is in the instrument of convention specified, with respect to which the government is therein precluded from issuing a law to a certain effect: whether to the effect of commanding the act, of permitting it, or of forbidding it. A law is issued to that effect notwithstanding. The issuing, then, of such a law (the sense of it, and likewise the sense of that part of the convention which provides against it being supposed clear) is a fact notorious and visible to all: in the issuing, then, of such a law, we have a fact which is *capable* of being taken for that common signal we have been speaking of. These bounds the supreme body in question has marked out to its authority: of such a demarcation, then, what is the effect? Either none at all, or this: that the disposition to obedience confines itself within these bounds. Beyond them the disposition is stopped from extending: beyond them the subject is no more prepared to obey the governing body of his own state, than that of any other. What difficulty, I say, there should be in conceiving a state of things to subsist in which the supreme authority is thus limited, — what greater difficulty in conceiving it with this limitation, than without any, I cannot see. The two states are, I must confess, to me alike conceivable: whether alike expedient, — alike conducive to the happiness of the people, is another question.

XXXVII. God forbid, that from any thing here said it should be concluded that in any society any convention is or can be made, which shall have the effect of setting up an insuperable bar to that which the parties affected shall deem a reformation: — God forbid that any disease in the constitution of a state should be without its remedy. Such might by some be thought to be the case, where that supreme body which in such a convention was one of the contracting parties, having incorporated itself with that which was the other, no longer subsists to give any new modification to the engagement. Many ways might however be found to make the requisite alteration, without any departure from the spirit of the engagement. Although that body itself which contracted the engagement be no more, a *larger body*, from whence the first is understood to have derived its title, may still subsist. Let this larger body be consulted. Various are the ways that might be conceived of doing this, and that without any disparagement to the dignity of the subsisting legislature: of doing it, I mean, to such effect, as that, should the sense of such *larger body* be favourable to the alteration, it may be made by a law, which, in this case, neither ought to be, nor probably would be, regarded by the body of the people as a breach of the convention. [*h*]

* *Vide supra*, par. 26.

† *Vide supra*, ch. i. par. 13, note [*b*.]

‡ *Vide supra*, par. 22.

[*h*] In Great Britain, for instance, suppose it were deemed necessary to make an alteration in the act of Union. If in an article stipulated in favour of England, there need be no difficulty, so that there were a majority for the alteration among the English members, without reckoning the Scotch. The only difficulty would be with respect to an article stipulated in favour of Scotland; on account, to wit, of the small number of the Scotch members, in comparison with the English. In such a case, it would be highly expedient, to say no more, for the sake of preserving the public faith, and to avoid irritating the body of the nation, to take some method for making the establishment of the new law depend upon their sentiments. One such method might be as follows: — Let the new law in question be enacted in the common form; but let its

XXXVIII. To return for a moment to the language used by those who speak of the supreme power as being limited in its own nature. One thing I would wish to have remembered. What is here said of the impropriety, and evil influence of that kind of discourse, is not intended to convey the smallest censure on those who use it, as if intentionally accessary to the ill effects it has a tendency to produce. It is rather a misfortune in the language, than a fault of any person in particular. The original of it is lost in the darkness of antiquity. We inherited it from our fathers, and maugre all its inconveniences, are likely, I doubt, to transmit it to our children.

XXXIX. I cannot look upon this as a mere dispute of words: I cannot help persuading myself, that the disputes between contending parties — between the defenders of a law and the opposers of it, would stand a much better chance of being adjusted than at present, were they but explicitly and constantly referred at once to the principle of UTILITY. The footing on which this principle rests every dispute, is that of matter of fact; that is, future fact — the probability of certain future contingencies. Were the debate, then, conducted under the auspices of this principle, one of two things would happen: either men would come to an agreement concerning that probability, or they would see at length, after due discussion of the real grounds of the dispute, that no agreement was to be hoped for. They would, at any rate, see clearly and explicitly the point on which the *dis*agreement turned. The discontented party would then take their resolution to resist or to submit, upon just grounds, according as it should apppear to them worth their while — according to what should appear to them the importance of the matter in dispute — according to what should appear to them the probability or improbability of success — *according*, in short, *as the mischiefs of submission should appear to bear a less, or a greater ratio to the mischiefs of resistance.* But the door to reconcilement would be much more open, when they saw that it might be, not a mere affair of passion, but a difference of judgment, and that, for any thing they could know to the contrary, a sincere one, that was the ground of quarrel.

XL. All else is but womanish scolding and childish altercation, which is sure to irritate, and which never can persuade. — *I* say, the legislature "can*not* do this — *I* say, that it *can*. *I* say, that to do this, *exceeds* the bounds of its *authority* — *I* say, it does *not*." It is evident, that a pair of disputants setting out in this manner, may go on irritating and perplexing one another for everlasting, without the smallest chance of ever coming to an agreement. It is no more than announcing, and that in an obscure and at the same time a peremptory and captious manner, their opposite persuasions, or rather affections, on a question of which neither of them sets himself to discuss the grounds. The question of utility, all this while, most probably is never so much as at all brought upon the carpet: if it be, the language in which it is discussed is sure to be warped and clouded to make it match with the obscure and entangled pattern we have seen.

XLI. On the other hand, had the debate been originally and avowedly instituted on the footing of utility, the parties might at length have come to an agreement; or at least to a visible and explicit issue.—"*I* say, that the mischiefs of the measure in question are to *such* an amount — *I* say, *not* so, but to a *less*. — *I* say, the benefits of it are only to *such* an amount — *I* say, *not* so, but to a *greater*."—This, we see, is a ground of controversy very different from the former. The question is now manifestly a question of conjecture concerning so many future contingent matters of fact: to solve it, both parties then are naturally directed to support their respective persuasions by the only evidence the nature of the case admits of; — the evidence of such *past* matters of fact as appear to be analogous to those contingent *future* ones. Now these *past* facts are almost always numerous: so numerous, that till brought into view for the purpose of the debate, a great proportion of them are what may very fairly have escaped the observation of one of the parties: and it is owing, perhaps, to this and nothing else, that that party is of the persuasion which sets it at variance with the other. Here, then, we have a plain and open road, perhaps, to present reconcilement: at the worst, to an intelligible and explicit issue — that is, to such a ground of difference as may, when thoroughly trodden and explored, be found to lead on to reconcilement at the last. Men, let them but once clearly under-

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commencement be deferred to a distant period, suppose a year or two: let it then, at the end of that period, be in force, unless petitioned against by persons of such a description, and in such number, as might be supposed fairly to represent the sentiments of the people in general; persons, for instance, of the description of those who at the time of the Union, constituted the body of electors. To put the validity of the law out of dispute, it would be necessary the fact upon which it was made ultimately to depend, should be in its nature too notorious to be controverted. To determine, therefore, whether the conditions upon which the invalidation of it was made to depend, had been complied with, is what must be left to the simple declaration of some person or persons; for instance, the King. I offer this only as a general idea, and as one amongst many that perhaps might be offered in the same view. It will not be expected that I should here answer objections, or enter into details.

stand one another, will not be long ere they agree. It is the perplexity of ambiguous and sophistical discourse that, while it distracts and eludes the apprehension, stimulates and inflames the passions,

But it is now high time we should return to our Author, from whose text we have been insensibly led astray, by the nicety and intricacy of the question it seemed to offer to our view.

CHAPTER V.

DUTY OF THE SUPREME POWER TO MAKE LAWS.

I. WE now come to the last topic touched upon in this digression: a certain "*duty*," which, according to our Author's account, the supreme power lies under:—the *duty of making laws*.

II. "Thus far," says he, "as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. *For since* the respective members are bound to conform themselves to the will of the state, it is expedient that they *receive directions* from the state declaratory of that its will. *But since* it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, therefore the state establishes general rules for the perpetual information and direction of all persons, in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity."

III. Still as obscure, still as ambiguous as ever. The "*supreme power*," we may remember, according to the definition so lately given of it by our Author, and so often spoken of, is neither more nor less than the *power to make laws*. Of this power we are now told that it is its "*duty*" to make laws. Hence we learn—what?—that it is its "*duty*" to do what it does; to be, in short, what it is. This, then, is what the paragraph now before us, with its apparatus of "*fors*" and "*buts*," and "*sinces*," is designed to prove to us. Of this stamp is that meaning, at least, of the initial sentence, which is apparent upon the face of it.

IV. Complete the sense of the phrase, "*to make laws*;" add to it, in this place, what it wants in order to be an adequate expression of the import which the preceding paragraph seemed to annex to it; you have now, for what is mentioned as the object of the "*duty*," another sense indeed, but a sense still more untenable than the foregoing. "Thus far," says our Author (recapitulating what he had been saying before) "as to the *right* of the supreme power to make laws."—By this "*right*," we saw, in the preceding chapter, was meant, a right to make laws *in all cases whatsoever*. "But further," he now adds, "it is its *duty* likewise." Its *duty*, then, to do—what? to do the same thing that it was before asserted to be its *right* to do—to make laws in all cases whatsoever: or (to use another word, and that our Author's own, and that applied to the same purpose) that it is its duty to be "*absolute*."* A sort of duty this, which will probably be thought rather a singular one.

V. Meantime the observation which, if I conjecture right, he really had in view to make, is one which seems very just indeed, and of no mean importance, but which is very obscurely expressed, and not very obviously connected with the purport of what goes before. The duty he here means is a duty which respects, I take it, not so much the actual *making* of laws, as the taking of proper measures to *spread abroad* the knowledge of whatever laws happen to *have been* made: a duty which (to adopt some of our Author's own words) is conversant, not so much about *issuing* "directions," as about providing that such as *are* issued shall be "*received*."

VI. Meantime, to speak of the *duties* of a supreme power;—of a *legislature*, meaning a *supreme* legislature;—of a set of men acknowledged to be absolute;—is what, I must own, I am not very fond of. Not that I would wish the subordinate part of the community to be a whit less watchful over their governors, or more disposed to unlimited submission in point of *conduct*, than if I were to talk with ever so much peremptoriness of the "*duties*" of these latter, and of the *rights* which the former have against them: [a] what I am afraid of is, running into solecism and confusion in *discourse*.

* Comm. p. 49.

[a] With this note let no man trouble himself, who is not used, or does not intend to use himself, to what are called *metaphysical* speculations; in whose estimation the benefit of understanding clearly what he is speaking of, is not worth the labour.

1. That may be said to be my *duty* to do (understand political duty) which you (or some other person or persons) have a *right* to have me made to do. I have, then, a DUTY *towards* you: you have a RIGHT as *against* me.

2. What you have a right to have me made to do (understand a political right) is that which I am liable, according to law, upon a requisition made on your behalf, to be *punished* for not doing.

VII. I understand, I think, pretty well, what is meant by the word *duty* (political duty) when applied to myself; and I could not persuade myself, I think, to apply it in the same sense in a regular didactic discourse to those whom I am speaking of as my supreme governors. That it is my *duty* to do, which I am liable to be *punished*, according to law, if I do not do: this is the original, ordinary, and proper sense of the word *duty*. [*b*] Have

3. I say *punished:* for without the notion of punishment (that is, of *pain* annexed to an act, and accruing on a certain *account*, and from a certain *source*) no notion can we have of either *right* or *duty*.

4. Now the idea belonging to the word *pain* is a simple one. To *define*, or rather (to speak more generally) to *expound* a word, is to resolve, or to make a progress towards resolving, the idea belonging to it into simple ones.

5. For expounding the words *duty*, *right*, *power*, *title*, and those other terms of the same stamp that abound so much in ethics and jurisprudence, either I am much deceived, or the only method by which any instruction can be conveyed, is that which is here exemplified. An exposition framed after this method I would term *paraphrasis*.

6. A word may be said to be expounded by *paraphrasis*, when not that *word* alone is translated into other *words*, but some whole *sentence*, of which it forms a part, is translated into another *sentence;* the words of which latter are expressive of such ideas as are *simple*, or are more immediately resolvable into simple ones than those of the former. Such are those expressive of *substances* and *simple modes*, in respect of such *abstract* terms as are expressive of what LOCKE has called *mixed modes*. This, in short, is the only method in which any abstract terms can, at the long run, be expounded to any instructive purpose; that is, in terms calculated to raise *images* either of *substances* perceived, or of *emotions;*—sources, one or other of which every idea must be drawn from, to be a clear one.

7. The common method of defining—the method *per genus et differentiam*, as logicians call it, will, in many cases, not at all answer the purpose. Among abstract terms we soon come to such as have no *superior genus*. A definition, *per genus et differentiam*, when applied to these, it is manifest, can make no advance: it must either stop short, or turn back, as it were, upon itself, in a *circulate* or a *repetend*.

8. "Fortitude is a virtue:"—Very well:—but what is a virtue? "A virtue is a disposition:"—Good again:—but what is a *disposition?* "A *disposition* is a - - -:" and there we stop. The fact is, a *disposition* has no *superior genus:* a *disposition* is not a - - -, anything:—this is not the way to give us any notion of what is meant by it. "A *power*," again, "is a right:" and what is a *right?* It is a *power*. An *estate* is an *interest*, says our Author somewhere, where he begins defining an estate:—as well might he have said an *interest* was an *estate*. As well, in short, were it to define in this manner, a conjunction or a preposition. As well were it to say of the preposition *through*, or of the conjunction *because;* a *through* is a - - -, or a *because* is a - - -, and so go on defining them.

9. Of this stamp, by the bye, are some of his most fundamental definitions; of consequence they must leave the reader where they found him. But of this, perhaps, more fully and methodically on some future occasion. In the mean time, I have thrown out these loose hints for the consideration of the curious.

[*b*] 1. One may conceive three sorts of duties; *political*, *moral*, and *religious;* correspondent to the three sorts of *sanctions* by which they are enforced; or the same point of conduct may be a man's duty on these three several accounts. After speaking of the one of these to put the change upon the reader, and without warning begin speaking of another, or not to let it be seen from the first which of them one is speaking of, cannot but be productive of confusion.

2. Political duty is created by punishment; or at least by the will of persons who have punishment in their hands; persons stated and *certain*,—political superiors.

3. Religious duty is also created by punishment: by punishment expected at the hands of a person *certain*,—the Supreme Being.

4. Moral duty is created by a kind of motive, which, from the *un*certainty of the *persons* to apply it, and of the *species* and *degree* in which it will be applied, has hardly yet got the name of punishment: by various mortifications resulting from the ill-will of persons *un*certain and variable,—the community in general; that is, such individuals of that community as he, whose duty is in question, shall happen to be connected with.

5. When in any of these three senses a man asserts a point of conduct to be a duty, what he asserts is the existence, actual or probable, of an *external* event; viz. of a punishment issuing from one or other of these sources in consequence of a contravention of the duty: an event *extrinsic* to, and distinct from, as well the conduct of the party spoken of, as the sentiment of him who speaks:—if he persists in asserting it to be a duty, but without meaning it should be understood that it is on any one of these three accounts that he looks upon it as such; all he then asserts is his own internal *sentiment:* all he means then is, that he feels himself *pleased* or *displeased* at the thoughts of the point of conduct in question, but without being able to tell *why*. In this case, he should e'en say so: and not seek to give an undue influence to his own single suffrage, by delivering it in terms that purport to declare the voice either of God, or of the law, or of the people.

6. Now which of all these senses of the word our Author had in mind; in which of them all he meant to assert that it was the duty of supreme governors to make laws, I know not. *Political* duty is what they cannot be subject to:* and to say that a duty even of the *moral* or *religous* kind to this effect is incumbent on them, seems rather a precipitate assertion.

In truth, what he meant was neither more nor less, I suppose, than that he should be glad to see them do what he is speaking of; to wit, "*make* laws;" that is, as he explains himself, spread abroad the knowledge of them.—Would he so? So indeed should I; and if asked why, what answer our Author would give I know not; but I, for my part, have no difficulty. I answer,—because I am persuaded that it is for the benefit of the community that they (its governors) should do so. This would be enough to warrant

* See the note following.

these supreme governors any such duty? No: for if they are at all liable to punishment according to law, whether it be for *not* doing any thing, or for *doing*, then are they not, what they are supposed to be, supreme governors: [c] those are the supreme governors, by whose appointment the former are liable to be punished.

VIII. The word duty, then, if applied to persons spoken of as supreme governors, is evidently applied to them in a sense which is figurative and improper: nor, therefore, are the same conclusions to be drawn from any propositions in which it is used in this sense, as might be drawn from them if it were used in the other sense, which is its proper one.

IX. This explanation, then, being premised;—understanding myself to be using the word *duty* in its improper sense, the proposition that it is the duty of the legislature to spread abroad, as much as possible, the knowledge of their will among the people, is a proposition I am disposed most unreservedly to accede to. If this be our Author's meaning, I join myself to him heart and voice.

X. What particular institutions our Author wished to see established in this view—what *particular* duties he would have found for the legislature under this *general* head of duty, is not very apparent: though it is what should have appeared more precisely than it does, ere his meaning could be apprehended to any purpose. What increases still the difficulty of apprehending it, is a practice which we have already had more than once occasion to detect him in,*—a kind of versatility, than which nothing can be more vexatious to a reader who makes a point of entering into the sentiments of his Author. He sets out with the word "*duty*" in his mouth; and, in the character of a *Censor*, with all due gravity begins talking to us of what *ought* to be. 'Tis in the midst of this lecture that our *Proteus* slips aside; puts on the *historian;* gives an insensible turn to the discourse; and without any warning of the change, finishes with telling us what *is*. Between these two points, indeed, the *is*, and the *ought to be*, so opposite as they frequently are in the eyes of other men, that spirit of obsequious *quietism* that seems constitutional in our Author, will scarce ever let him recognise a difference. 'Tis in the second sentence of the paragraph that he observes that "it is *expedient* that they" (the people) "receive directions from the state" (meaning the governing body) "declaratory of that its will." 'Tis in the very next sentence that we learn from him, that what it is thus "*expedient*" that the state *should* do, it *does* do. "But since it is impossible in so great a multitude, to give particular injunctions to every particular man relative to each particular action, therefore," says he, "the state establishes" (does *actually* establish) "general rules" (*the* state generally, *any* state, that is to say, that one can mention, all states in short whatever, *do* establish) "general rules for the perpetual information and direction of *all* persons in *all* points, whether of positive or of negative duty." Thus far our Author; so that, for aught appears, whatever he could *wish* to see done in this view, *is* done. Neither this state of our own, nor any other, does he wish to see do any thing more in the matter than he sees done already; nay, nor than what is sure to be done at all events: so that happily the duty he is here so forward to lay on his superiors will not sit on them very heavy. Thus far is he from having any determinate instructive meaning in that part of the paragraph in which, to appearance, and by accident, he comes nearest to it.

XI. Not that the passage, however, is absolutely so remote from meaning, but that the inventive complaisance of a commentator of

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rant me in my own opinion for saying that they *ought* to do it. For all this, I should not, at any rate, say that is was their *duty* in a *political* sense. No more should I venture to say it was in a *moral* or *religious* sense, till I were satisfied whether they themselves *thought* the measures useful and feasible, and whether they were generally *supposed* to think so.

Were I satisfied that they *themselves* thought so, God then, I might say, knows they do. God, we are to suppose, will punish them if they neglect pursuing it. It is then their religious duty. Were I satisfied that the *people* supposed they thought so: the people, I might say, in case of such neglect,—the people, by various manifestations of its ill-will, will also punish them. It is then their *moral* duty.

In any of these senses, it must be observed, there can be no more propriety in averring it to be the duty of the supreme power to pursue the measure in question, than in averring it to be their duty to pursue any other supposable measure equally beneficial to the community. To usher in the proposal of a measure in this peremptory and assuming guise, may be pardonable in a loose rhetorical harangue, but can never be justifiable in an exact didactic composition. Modes of *private moral* conduct there are indeed many, the tendency whereof is so well known and so generally acknowledged, that the observance of them may be well styled a duty. But to apply the same term to the particular details of *legislative* conduct, especially newly proposed ones, is going, I think, too far, and tends only to confusion.

[c] I mean for what they do, or omit to do, when *acting in a body:* in that body in which, when acting, they are *supreme*. Because for any thing any of them do separately, or acting in bodies that are subordinate, they may any of them be punished without any disparagement to their supremacy. Not only any *may* be, but many *are:* it is what we see examples of every day.

* *Vide supra*, ch. ii. par. 11, ch. iii. par. 7. ch. iv. par. 10.

the admiring breed might find it pregnant with a good deal of useful matter. The design of disseminating the knowledge of the laws is glanced at by it, at least with a show of approbation. Were our Author's writings, then, as sacred as they are mysterious; and were they in the number of those which stamp the seal of authority on whatever doctrines can be fastened on them; what we have read might serve as a text, from which the obligation of adopting as many measures as a man should deem subservient to that design, might, without any unexampled violence, be deduced. In this oracular passage I might find inculcated, if not *totidem syllabis*, at least *totidem literis*, as many points of legislative duty as should seem subservient to the purposes of *digestion* and *promulgation*. Thus fortified, I might press upon the legislature, and that on the score of "*duty*," to carry into execution, and that without delay, many a busy project, as yet either unthought of or unheeded. I might call them with a tone of authority to their work: I bid them go make provision forthwith for the bringing to light such scattered materials as can be found of the judicial decisions of time past, — sole and neglected materials of common law; — for the registering and publishing of all future ones as they arise; — for transforming, by a digest, the body of the common law thus completed, into statute-law; — for breaking down the whole together into *codes* or parcels, as many as there are classes of persons distinguishably concerned in it; — for introducing to the notice and possession of every person his respective code: — works which public necessity cries aloud for, at which professional interest shudders, and at which legislative indolence* stands aghast.

XII. All these leading points, I say, of legislative economy, with as many points of detail subservient to each as a meditation not unassiduous has suggested, I might enforce, were it necessary, by our Author's oracular authority. For nothing less than what has been mentioned, I trust, is necessary, in order that every man may be made to know, in the degree in which he *might* and *ought* to be made to know, what (in our Author's words) "to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity." In taking my leave of our Author, I finish gladly with this pleasing peroration: a scrutinizing judgment, perhaps, would not be altogether satisfied with it; but the ear is soothed by it, and the heart is warmed.

XIII. I now put an end to the tedious and intricate war of words that has subsisted, in a more particular manner during the course of these two last chapters: a logomachy, wearisome enough, perhaps, and insipid to the reader, but beyond description laborious and irksome to the writer. What remedy? Had there been sense, I should have attached myself to the sense: finding nothing but words, to the words I was to attach myself, or to nothing. Had the doctrine been but *false*, the task of exposing it would have been comparatively an easy one: but it was what is worse, *unmeaning*; and thence it came to require all these pains which I have been here bestowing on it: to what profit, let the reader judge.

"Well then," cries an objector, "the task you have set yourself is at an end; and the subject of it, after all, according to your own representation, teaches nothing; — according to your own showing, it is not worth attending to. Why then bestow on it so much attention?"

In this view: To do something to instruct, but more to undeceive, the timid and admiring student: — to excite him to place more confidence in his own strength, and less in the infallibility of great names: — to help him to emancipate his judgment from the shackles of authority: — to let him see that the not understanding a discourse may as well be the writer's fault as the reader's: — to teach him to distinguish between shewy language and sound sense: — to warn him not to pay himself with words: — to show him that what may tickle the ear, or dazzle the imagination, will not always inform the judgment: — to show him what it is our Author can do, and has done; and what it is he has not done, and cannot do: — to dispose him rather to fast on ignorance than feed himself with error: — to let him see, that with regard to an expositor of the law, our Author is not *he that should come*, but that we may be still *looking for another*. — "Who then," says my objector, "shall be that other? Yourself?" — No, verily. My mission is at end, when I have *prepared the way before him*.

* Had I seen in those days what every body has seen since, instead of *indolence* I should have put *corruption*. — Note of the Author, 1822.

FINIS. !!!

PRINCIPLES

OF

THE CIVIL CODE.

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PRINCIPLES

OF

THE CIVIL CODE.

INTRODUCTION.

Of all the branches of legislation, the Civil Code is that which presents the fewest attractions to those who do not study the law as a profession. This assertion is not strong enough, since this branch has hitherto almost inspired a species of disgust. Curiosity has for a long time been ardently directed to the consideration of political economy, penal law, and the principles of government. Celebrated works have rendered these studies respectable; and upon pain of acknowledging a humiliating inferiority to those around us, it is necessary that these should be understood, and an opinion be formed respecting them.

But the Civil Law has never yet passed the obscure bounds of the Bar. Its commentators sleep in the dust of the libraries, by the side of their opponents. The public are ignorant even of the names of the sects that divide them, and regard with a silent respect the numerous folios, the enormous compilations, ornamented with the pompous titles of *Body of Laws* and *Universal Jurisprudence*, &c.

The general dislike to this study is the result of the manner in which it has been treated. All these works occupy the same place in the science of law, which was once occupied by the works of the schoolmen in the natural sciences, before the establishment of experimental philosophy. Those who attribute their dryness and their obscurity to the nature of their subject, show them too great an indulgence.

Indeed, to what does this part of the laws refer? It treats of every thing which is most interesting to men:—of their security, of their property, of their reciprocal and daily transactions, of their domestic condition in the relations of father, husband, child. It is here we behold the rise of *Rights* and *Obligations*, for all the objects of law may be reduced to these two terms, and there is then no mystery.

The civil code is at bottom only the penal code under another aspect: it is not possible to understand the one, without understanding the other. The establishment of *Rights* is the granting of permissions, and the issuing of prohibitions: in a word, it is the creation of offences. To commit an offence is, on the one hand, to violate an obligation—on the other hand, a right. To commit a private offence is to violate an obligation due to an individual—a right which he has over us. To commit a public offence is to violate an obligation due to the public—a right which the public have over us. Civil law is therefore only penal law considered under another aspect. If I consider the law at the moment it confers a right or imposes an obligation, I consider it in a civil point of view. If I consider the law in its sanctions, in its effects, with respect to a violated right or broken obligation, I consider it in a penal point of view.

What, then, is meant by *Principles of Civil Law?* We intend to express the motives of the laws—the knowledge of the true reasons which ought to guide the legislator in the distribution of the rights he confers, or the obligations he imposes upon individuals.

In the whole library of writings upon the civil law, we search in vain for one which has had for its object the exhibition of the reasons upon which it is founded: philosophy has never entered there. The Theory of Civil Law by Linguet, which promises much, is far from deserving its title: it is the production of an unregulated imagination, governed by a bad heart. An oriental despotism is the model to which he would reduce all the European governments, that he might correct all their notions of liberty and humanity, which seem like mournful spectres to torment him.

The disputes of jurisprudence have produced, even in its schools, a set of doubters, who have doubted whether they had any principles. According to them, every thing is arbitrary — the law is good, because it is law: because a decision, whatever it may be, produces the great benefit of peace. There is in this opinion a little truth, and a great deal of error. It will be seen in the following work, that the principle of utility extends over this portion of the laws, as well as over all the others, but that its application is difficult — that it requires an intimate knowledge of human nature.

The first ray of light which broke in upon Mr. Bentham in his legal studies was, that *the law of Nature — the original Compact — the moral Sense — the notions of Right and Wrong*, which had been employed for the explanation of the laws, were only at bottom *those innate ideas* whose falsehood had been so ably demonstrated by Mr. Locke. He saw that they revolved in a vicious circle. Familiarized with the method of Bacon and of Newton, he resolved to introduce it into legislation: he has made it an experimental science: he has discarded all dogmatic words; he has rejected all terms that do not express some sensation of pleasure or of pain. For example, he will not admit that property is an inherent right—a natural right; because these terms explain nothing, prove nothing. The terms Justice and Injustice have in his eyes the same inconvenience of prejudging, instead of illuminating, the questions to which they refer. When he proposes to establish a law, he does not pretend to have discovered a corresponding law in the *law of nature*, and by a common trick present that as already done, which still remains to be done. When he explains obligations, he does not envelope them in mysterious reasons; he admits nothing on supposition. He clearly shows that every obligation ought to be founded either upon some previous service received by the person on whom it is imposed, or on some superior need on the part of the person in whose favour it is imposed, or upon some mutual agreement which derives all its force from its utility. Thus always guided by experience and observation, he only considers the effects which the laws produce upon the faculties of man as a sensible being, and he always assigns *pains to be avoided* as the only arguments of real value.

The Civilians never leave off reasoning upon fictions, and giving these fictions the same effect as realities. For example, they admit of contracts, which never existed; of *quasi contracts*, which never had the appearance of existing. In certain cases, they admit a *civil death:* in other cases, they deny *natural death*. Such a dead man is not dead, such another living man is not living; such an one who is absent ought to be considered as present, such an one who is present ought to be considered as absent: a province is not where it is; a country does not belong to those to whom it belongs; men are sometimes only things, and as such cannot possess rights; things are sometimes beings which possess rights, and are bound by obligations. They recognise imprescriptible rights which have always been prescribed against, and unalienable rights which have always been alienated; and *that which is not*, is always more distinctly visible to their eyes than *that which is*. Take away their fictions, or rather their lies, they know not where they are: accustomed to these crutches, they cannot walk without them. Mr. Bentham has rejected all these puerile arguments: he has not one gratuitous supposition, not one arbitrary definition — not a reason which is not the expression of a fact, not a fact which is not drawn from an effect of the law, either good or bad.

It is by this method of always reasoning consistently with his principles, that he has made the Civil Law a new science: new and even paradoxical to those who have been educated in the opinions of the ancient schools; but simple, natural, and even familiar, to those who have not been misled by false systems. Hence a translation of this book would have in all languages the same meaning and the same force, because it appeals to the experience of all men, instead of technical reasons — of reasons founded upon abstract terms, upon arbitrary definitions, which possess only a local value, and consist only of words, which disappear when no synonyms are found by which to translate them. It is thus the savage Africans, who make use of shells for money, discover their poverty immediately that they pass their own frontiers, and wish to exchange their conventional riches with strangers.

In Mr. Bentham's MSS. there are frequent references to the laws of England. As his observations would often have appeared to want a foundation, if I had not mentioned the particular laws against which they were directed, I have endeavoured, for the purpose of clearness, to develope that which was only an allusion to the original. I may have made some mistakes: these ought not to be imputed to the Author. These laws are in general so difficult to understand, that it is dangerous for an Englishman, who is not a lawyer, to hazard an opinion respecting them, and much more so, therefore, for one who is not an Englishman.

DUMONT

PART I.—OBJECTS OF THE CIVIL LAW.*

CHAPTER I.

OF RIGHTS AND OBLIGATIONS.

EVERY thing which the legislator is called upon to distribute among the members of the community, may be reduced to two classes:

1*st*, Rights.
2*d*, Obligations.

Rights are in themselves advantages; benefits for him who enjoys them: obligations, on the other hand, are duties; burthensome charges for him who has to fulfil them.

Rights and obligations, though distinct and opposite in their nature, are simultaneous in their origin, and inseparable in their existence. According to the nature of things, the law cannot grant a benefit to any, without, at the same time, imposing a burthen on some one else; or, in other words, a right cannot be created in favour of any one, without imposing a corresponding obligation on another. In what manner is a right of property in land conferred on me? By imposing upon every body except myself the obligation not to touch its produce. How is the right of commanding conferred on me? By imposing upon a district, or a number of persons, the obligation to obey me.

The legislator ought to confer rights with pleasure, since they are in themselves a benefit; he ought to impose obligations with repugnance, since they are in themselves an evil. In accordance with the principle of utility, he ought never to impose a burthen but that he may confer a benefit of a greater value.

In the same proportion as it creates obligations, the law curtails liberty: it converts into offences, acts which would otherwise be permitted and unpunishable. The law creates an offence, either by a positive commandment or by a prohibition.

These curtailments of liberty are inevitable. It is impossible to create rights, to impose obligations, to protect the person, life, reputation, property, subsistence, or liberty itself, but at the expense of liberty.

But every restraint imposed upon liberty is liable to be followed by a natural feeling of pain, more or less great, independent of an infinite variety of inconveniences and sufferings which may result from the particular mode of this restraint. It follows, therefore, that no restraint should be imposed, no power conferred, no coercive law sanctioned, without a specific and satisfactory reason. There is always one reason against every coercive law, and one reason which, were there no other, would be sufficient by itself: it is, that such a law is restrictive of liberty. Whoever proposes a coercive law, ought to be ready to prove, not only that there is a specific reason in favour of this law, but also that this reason is more weighty than the general reason against every law.

The proposition, although almost self-evident, that every law† is contrary to liberty, is not generally recognised: on the contrary, the zealots of liberty, more ardent than enlightened, have made a conscience of combating it. And how have they done it? They have perverted the language, and will not employ this word in its common acceptation. They speak a language that belongs to no one: they say, *Liberty consists in the power of doing every thing which does not hurt another*. But is this the ordinary meaning of this word? The liberty of doing evil, is it not liberty? If it is not liberty, what is it then? and what word should we make use of in speaking of it? Do we not say that liberty should be taken away from fools, and wicked persons, because they abuse it?

According to this definition, then, I do not know if I have the liberty of doing or not doing any action, until I have examined all its consequences? If it appear to me hurtful to a single individual, whether the law permit, or even command it, I have not liberty to do it! An officer of justice would not have liberty to punish a thief, unless he was sure such punishment would not hurt such thief! Such are the absurdities implied in this definition.

What says unsophisticated reason? Let us seek from thence for true propositions.

The sole object of government ought to be the greatest happiness of the greatest possible number of the community.

The happiness of an individual is greater, in proportion as his sufferings are lighter and fewer in number, and as his enjoyments are greater and larger in number.

The care of providing for his enjoyments ought to be left almost entirely to each individual; the principal function of government being to protect him from sufferings.

It fulfils this office by creating rights which it confers upon individuals: rights of personal security; rights of protection for honour; rights of property; rights of receiving assist-

* The following work is edited from the Traités de Legislation, as published by Dumont, and the original MSS. of Bentham.

† It is necessary to except those laws by which restrictive laws are repealed: those laws which permit what other laws have forbidden.

ance in case of need. To these rights, correspond offences of all classes. The law cannot create rights without creating the corresponding obligations. It cannot create rights and obligations without creating offences.* It can neither command nor prohibit, without restraining the liberty of individuals.†

The citizen, therefore, cannot acquire any right without the sacrifice of a part of his liberty. Even under a bad government, there is no proportion between the sacrifice and the acquisition. Governments approach to perfection, in proportion as the acquisition is greater, and the sacrifice less.

CHAPTER II.

DISTINCT OBJECTS OF THE CIVIL LAW.

IN this distribution of rights and obligations, the legislator, we have already said, should have for his object the happiness of the body politic. In inquiring more particularly in what this happiness consists, we find four subordinate objects—

Subsistence.
Abundance.
Equality.
Security.

The more perfect the enjoyment of all these particulars, the greater the sum of social happiness, and especially of that happiness which depends upon the laws.

It may be shown, that all the functions of the law may be referred to these four heads: to provide for subsistence; to secure abundance; to befriend equality; to maintain security.

This division does not possess all the clearness and precision which could be desired. The boundaries which separate these objects are not always easily determined; they approach at different points, and are confounded one with the other. But it is enough to justify this division, that it is the most complete, and that we shall be called in many circumstances to consider each of the objects it contains, separately and distinct from each of the others.

Subsistence, for example, is included in abundance; it is, however, properly mentioned separately, because the laws ought to do for subsistence many things which they ought not to permit to be done for abundance.

Security admits of as many distinctions as there are kinds of actions which may be opposed to it. It relates to the person, to the honour, to property, to condition.

Actions hurtful to security, when prohibited by the laws, receive the character of crimes.

Among these objects of the law, security is the only one which necessarily embraces the future: subsistence, abundance, equality, may be regarded for a moment only; but security implies extension in point of time, with respect to all the benefits to which it is applied. Security is therefore the principal object.

I have placed equality among the objects of the law. In an arrangement intended to give to every man the greatest possible amount of happiness, no reason can be assigned why the law should seek to give one man more than another. There are, however, good reasons why it should not do it. The advantage acquired by the one, can only exist in consequence of an equivalent disadvantage being borne by another. The advantage would only be enjoyed by the favoured party: the disadvantage would be felt by all those who were not thus favoured.

Equality may be fostered, both by protecting it where it exists, and by seeking to produce it where it does not exist. But here lies the danger: a single error may overturn the whole social order.‡

It may appear surprising, that liberty is not placed among the principal objects of the law. But in order that we may have clear notions, it is necessary to consider it as a branch of security: personal liberty is security against a certain species of injury which affects the person; whilst, as to political liberty, it is another branch of security — security against the injustice of the members of the Government. What relates to this object, belongs not to the civil, but to the constitutional code.

CHAPTER III.

RELATION BETWEEN THESE OBJECTS.

THESE four objects of the law appear very distinct to the mind, but they are much less so in practice. The same law may serve for several of them, because they are often united. What is done, for example, for the sake of security, may be done also for the sake of subsistence and abundance.

But there are circumstances in which it is not possible to reconcile these objects: hence a measure suggested by one of them will be

* To create an offence, is to convert an act into an offence—to give, by a prohibition, the quality of an offence to an act.

† When the law confers a right, it is by giving the quality of offences to the different actions by which the enjoyment of this right may be interrupted or opposed.

‡ Equality may be considered with regard to all the advantages derived from the laws: Political Equality, or Equality in point of Political Rights—Civil Equality, or Equality in point of Civil Rights. But when the word is employed alone, it is usually understood as referring to the distribution of property.

condemned by another. Equality, for example, would require a certain distribution of property, which is incompatible with security.

When this contradiction exists between these objects, it is necessary to find some means of deciding which ought to have the pre-eminence; otherwise, instead of guiding us in our researches, their consideration will serve only to augment our confusion.

At the first glance it is perceived, that subsistence and security rise together to the same height: abundance and equality are manifestly of an inferior order. Indeed, without security, equality itself could not endure a single day. Without subsistence, abundance cannot exist. The two first ends are like life itself: the two last are the ornaments of life.

In legislation, the most important object is security. If no direct laws are made respecting subsistence, this object will be neglected by no one. But if there are no laws respecting security, it will be useless to have made laws respecting subsistence: command production — command cultivation; you will have done nothing: but secure to the cultivator the fruits of his labour, and you most probably have done enough.

Security, we have observed, has many branches: it is necessary that one branch of security should give way to another. For example, liberty, which is one branch of security, ought to yield to general security, since it is not possible to make any laws but at the expense of liberty.

It is not possible, then, to obtain the greatest good, but by the sacrifice of some subordinate good. In distinguishing among these objects, which, on each occasion, deserves the pre-eminence, consists the difficulty of the legislative art. Each one claims pre-eminence in turn, and it sometimes requires a complex calculation to determine to which the preference is due.

Equality ought not to be favoured, except in cases in which it does not injure security; where it does not disturb the expectations to which the laws have given birth; where it does not derange the actually established distribution.

If all property were to be equally divided, the certain and immediate consequence would be, that there would soon be nothing more to divide. Every thing would be speedily destroyed. Those who had hoped to be favoured by the division, would not suffer less than those at whose expense it would be made. If the condition of the industrious were not better than the condition of the idle, there would be no reason for being industrious.

If the principle were established, that all men should possess *equal rights*, by a necessary train of consequences, all legislation would be rendered impossible. The laws never cease establishing inequalities, since they cannot bestow rights upon any, without imposing obligations upon others.

Declare that all men, that is, all the human race, have equal rights: there is an end of all subordination. The son has equal rights with his father; he has the same right to direct and to punish him; he has as much right in his father's house, as his father himself. The maniac has the same right to shut up others, as they have to shut up him. The idiot has the same right to govern his family, as his family have to govern him. All this is included in the equality of rights: it means all this, or it means nothing at all. It is true, those who have maintained this doctrine of the equality of rights, have neither been fools nor idiots. They had no intention of establishing this absolute equality: they had in their minds some restrictions, some modifications, some explanations. But if they knew not how to speak in a sensible and intelligible manner, was it possible that the blind and ignorant multitude should better understand what they did not understand themselves? And if they proclaimed independence, was it not too certain that they would be listened to?

CHAPTER IV.

OF LAWS RELATIVE TO SUBSISTENCE.

WHAT can the law do relative to subsistence? Nothing directly. All that the law can do is to create *motives;* that is to say, to establish rewards and punishments, by the influence of which, men shall be induced to furnish subsistence to themselves. But nature has created these motives, and given them sufficient energy. Before the idea of law was formed, *want* and *enjoyment* had done, in this respect, every thing which could have been done by the best concerted laws. Want, armed with every pain, and even death itself, had commanded labour, had sharpened courage, had inspired foresight, had developed all the faculties of man. Enjoyment, the companion of every satisfied want, had formed an inexhaustible fund of rewards for those who had overcome the obstacles and accomplished the designs of nature.

The force of the physical sanction being sufficient, the employment of the political sanction would be superfluous.

Besides, the motives furnished by the laws are always more or less precarious in their operation: this is a consequence of the imperfection of the laws themselves, or of the difficulty of establishing the necessary facts, before bestowing reward or punishment. The hope of impunity glides to the bottom of the heart, in all the intermediate degrees through

which it is necessary to pass, before arriving at the accomplishment of the law. But those natural effects, which we may consider as the rewards and punishments of nature, do not admit of this uncertainty: there is no evasion, no delay, no favour: experience announces the event; experience confirms it — each succeeding day repeats the lesson of the past, and the uniformity of this course leaves no place for doubt. What can be added, by direct legislation, to the constant and irresistible power of these natural motives?

But the law may indirectly provide for subsistence, by protecting individuals whilst they labour, and by securing to them the fruits of their industry when they have laboured: *security* for the labourer — *security* for the fruits of labour. In these cases, the benefit of the law is inestimable.

CHAPTER V.

OF LAWS RELATIVE TO ABUNDANCE.

SHALL laws be made, directing individuals not to be contented with subsistence alone, but to seek abundance? No: this would be a superfluous employment of artificial means, when the natural means are sufficient. The attractions of pleasure, the succession of wants, the active desire of adding to our happiness, will, under the safeguard of security, incessantly produce new efforts after new acquisitions. Wants and enjoyments, these universal agents in society, after having raised the first ears of corn, will by degrees erect the granaries of abundance, always increasing and always full. Desires extend themselves with the means of gratification; the horizon is enlarged in proportion as we advance; and each new want, equally accompanied by its pleasure and its pain, becomes a new principle of action. Opulence, which is only a comparative term, does not arrest this movement when once it is begun: on the contrary, the greater the means, the greater the field of operations, the greater the reward, and, consequently, the greater the force of the motive which actuates the mind. But in what does the wealth of society consist, if not in the total of the wealth of the individuals composing it? And what more is required than the force of these natural motives for carrying the increase of wealth to the highest possible degree?

We have seen that abundance is produced by degrees, by the continued operation of the same causes which had provided for subsistence: there is no opposition between these two objects. On the other hand, the greater the abundance, the more secure is subsistence. Those who have condemned abundance, under the name of luxury, have never understood this connexion.

Famines, wars, accidents of every kind, so often attack the resources of subsistence, that a society which has no superfluity would often be exposed to want necessaries. This is seen among savage nations: it is what has often been witnessed among all nations in the time of their ancient poverty; it is what has happened in our own days, in countries but little favoured by nature, such as Sweden, and in those countries in which the government has opposed the operations of commerce instead of protecting them; — whilst those countries in which luxury abounds, and where the governments are enlightened, are beyond the reach of famine. Such is the happy situation of England, where commerce is free. The gewgaw, useless in itself, obtains a value in exchange for necessaries: the manufactories of luxury are offices of insurance against want: the materials used in a brewery or a manufactory of starch, may be converted into a source of subsistence. How often has the keeping of dogs and horses been decried, as destroying the food of men! The profound politicians who would put down these expenses, do not rise one degree above those apostles of disinterestedness, who, for the purpose of producing abundance of corn, set fire to the granaries.

CHAPTER VI.

PROPOSITIONS OF PATHOLOGY UPON WHICH THE ADVANTAGE OF EQUALITY IS FOUNDED.

PATHOLOGY is a term used in medicine. It has not hitherto been employed in morals, but it is equally necessary there. When thus applied, moral *pathology* would consist in the knowledge of the feelings, affections, and passions, and their effects upon happiness. Legislation, which has hitherto been founded principally upon the quicksands of instinct and prejudice, ought at length to be placed upon the immoveable base of feelings and experience: a moral thermometer is required, which should exhibit every degree of happiness and suffering. The possession of such an instrument is a point of unattainable perfection; but it is right to contemplate it. A scrupulous examination of more or less, in point of pleasure or pain, may at first be esteemed a minute enterprise. It will be said that we must deal with generalities in human affairs, and be contented with a vague approximation. This is, however, the language of indifference or incapacity. The feelings of men are sufficiently regular to become the object of a science or an art; and till this is done, we can only grope our way by making irregular and ill-directed efforts. Medicine is founded upon the axioms of physical pathology: morals are the medicine of the soul: legislation is the practical branch; it ought,

therefore, to be founded upon the axioms of mental pathology.

In order to judge of the effect of a portion of wealth upon happiness, it must be considered in three different states:

1*st*, When it has always been possessed.
2*d*, When it is about to be gained.
3*d*, When it is about to be lost.

General observation. — When the effect of a portion of wealth upon happiness is spoken of, it is always without reference to the sensibility of the particular individual, and the exterior circumstances in which he may be placed. Difference of character is inscrutable; and there are no two individuals whose circumstances are alike. If these two considerations were not laid on one side, it would be impossible to form a single general proposition: but though each of these propositions may be found false or inexact in each particular case, it will neither militate against their speculative correctness, nor their practical utility. It is sufficient, — 1*st*, If they approach more nearly to the truth than any others which can be substituted for them; and, 2*dly*, If they may be employed by the legislator, as the foundation of his labours, with less inconvenience than any others.

I. We proceed to the examination of the first case we have to examine — the effect of a portion of wealth when it has always been possessed.

1. *Each portion of wealth is connected with a corresponding portion of happiness.*

2. *Of two individuals, possessed of unequal fortunes, he who possesses the greatest wealth will possess the greatest happiness.*

3. *The excess of happiness on the part of the most wealthy will not be so great as the excess of his wealth.*

4. *For the same reason, the greater the disproportion between the two masses of wealth, the less the probability that there exists an equally great disproportion between the masses of happiness.*

5. *The more nearly the actual proportion approaches to equality, the greater will be the total mass of happiness.*

What is here said of wealth, ought not to be limited to pecuniary wealth: the term is used with a more extended signification, and includes every thing which serves for subsistence and abundance. It is for abbreviation's sake that *a portion of wealth* is spoken of, instead of *a portion of the matter of wealth.*

We have said, each portion of wealth is connected with a corresponding portion of happiness: strictly speaking, it should have been, has a certain chance of being so connected. The efficacy of any cause of happiness is always precarious; in other words, a cause of happiness may not produce its ordinary effect; nor the same effect upon every individual. It is here that it is necessary to apply what has been said with respect to particular sensibility and character, and the variety of circumstances in which they may be found.

The second proposition is derived from the first: of two individuals, he who possesses the most wealth will possess the greatest happiness, or chance of happiness. This is a truth proved by the experience of all the world. I charge the man who would doubt it to give what he possesses of superfluity to the first person who asks it of him. This superfluity, according to his system, is worth no more than the sand on which he treads: it is a burden, and nothing else. The manna of the desert became corrupt, when more was collected than could be consumed. If, in the same manner, wealth, after it had reached a certain amount, did not give an increased chance of happiness, no one would wish for more than this amount, and the desire of accumulation would have an ascertained boundary.

The third proposition will be less contested. Place on one side one thousand labourers, having enough to live upon, and a trifle to spare: place on the other side a king, or, that he may not be troubled with the cares of royalty, a well apportioned prince, he himself as rich as all these labourers together. It is probable that his happiness will be greater than the medium happiness of each of them, but not equal to the sum-total of all their little masses of happiness; or, what amounts to the same thing, his happiness will not be one thousand times greater than the medium happiness of a single one among them. If the mass of his happiness should be found ten times, or even five times greater, this would still be much. The man who is born in the lap of wealth, is not so sensible of the value of fortune, as he who is the artisan of his own fortune. It is the pleasure of acquiring, and not the satisfaction of possessing, which is productive of the greatest enjoyment. The first is a lively sensation, sharpened by desire and previous privations: the other is a feeble sentiment, formed by habit, unenlivened by contrast, and borrowing nothing from imagination.

II. We proceed to the examination of the second case — the effect of a portion of wealth when it first comes into the hands of a new possessor. Observe, it will be proper to consider this gain as unexpected, and to suppose that this increase of wealth is received suddenly, and, as it were, by chance.

1. *By repeated divisions, a portion of wealth may be reduced to so small an amount as not to produce any happiness for any one of its co-partakers.* This would happen if the portion of each were less than the value of the smallest known coin; but it is not necessary

to carry the division to this extreme point, in order that the proposition may be true.

2. *Among co-partakers of equal fortunes, the more completely, in the distribution of a portion of wealth, this equality is allowed to remain, the greater will be the total mass of happiness.*

3. *Among co-partakers of unequal fortunes, the more the distribution of a portion of wealth contributes to their equality, the greater will be the total mass of happiness.*

III. We proceed to the examination of the third case—the effect of a portion of wealth when it leaves the hands of its possessor. It will be again necessary to consider this loss as unexpected; to suppose that it is unlooked for. A loss is almost always unexpected, because a man naturally hopes to keep what he possesses. This expectation is founded upon the ordinary course of things; for if we look at the whole mass of men, they not only keep what they have acquired, but still further increase its amount. The proof is in the difference between the primitive poverty of every country and its actual wealth.

1. *The loss of a portion of wealth will produce a loss of happiness to each individual, more or less great, according to the proportion between the portion he loses and the portion he retains.*

Take away the fourth part of his fortune, and you take away the fourth part of his happiness; and so of the rest.*

But there are cases in which this proportion does not continue. If, in taking three-fourths of my fortune, you trench upon my physical wants, and in taking only the half you leave these wants untouched, the loss of happiness will not be simply the half, but the double, the quadruple, the ten-fold of what it is in the other case: one knows not where to stop.

2. (This point being settled.) *The greater the number of persons with equal fortunes, among whom a given loss is divided, the less considerable the loss which results from it to the total mass of happiness.*

3. *A certain point being reached, a further division would render each share impalpable. The loss occasioned to the mass of happiness becomes null.*

4. *Among unequal fortunes, the loss of happiness produced by a loss of wealth, will be so much the less when the distribution of the loss is made in such manner as to cause them to approach most nearly to equality:* (when considered without reference to the inconveniences attached to the violation of security.)

Governments, profiting by the progress of knowledge, have favoured, in many respects, the principles of equality in the distribution of losses. It is thus that they have encouraged the establishment of assurance offices. In these useful contracts, individuals assess their shares beforehand, in order to be prepared for all possible losses. The principle of assurance, founded upon the calculation of probabilities, is only the art of distributing losses among a great number of associates, so as to render them extremely light, and almost null.

The same intention has directed princes, when they have made compensation, at the expense of the state, to such of their subjects as have suffered from public calamities or the devastations of war. Nothing could have been more wise, or better intended in this respect, than the administration of Frederick the Great: this is one of the most admirable points of view under which we can contemplate the social art.

Some few attempts have been made to indemnify individuals for the losses caused by crimes on the part of malefactors. The examples of this kind are, however, still rare. It is an object which deserves the attention of legislators, since by this means the evil of offences directed against property may be reduced almost to nothing. But such a system would require to be regulated with great care, that it might not become hurtful. It ought not to favour indolence or imprudence which neglects precautions against crimes, because secure of obtaining an indemnification. The utility of the remedy would depend, therefore, upon the manner in which it was administered. But it is a culpable indifference which rejects a salutary measure, in order to spare itself the trouble of separating it from its inconveniences.

The principles laid down above will equally serve for regulating the distribution of a loss among many persons charged with a common responsibility. If their respective contributions follow the quantity of their respective fortunes, their relative condition will be the same as before; but if it be desirable to seize this occasion to make them approach more nearly to equality, a different proportion must be adopted. To assess them all equally, without regard to the difference of their fortunes, would be a third plan, which would accord neither with equality nor security.

In order to make this subject more clear, I shall present a compound case, in which there are two individuals, one of whom seeks a profit at the expense of the other. We shall then determine the effect of a portion of wealth, which, in order to pass into the hands of one individual in the shape of gain,

* It is to this head that the evil of gambling may be referred. Though the chances, as they respect money, may be equal, the chances, as they respect happiness, are always unfavourable. I possess £1000; the stake is £500: if I lose, my fortune is diminished one half; if I gain, it is is only increased one third. Suppose the stake to be £1000: if I gain, my happiness is not doubled with my fortune; if I lose, my happiness is destroyed—I am reduced to poverty.

must come out of the hands of another individual in the shape of loss.

1 *Prop.* Among competitors of equal fortunes, if what is gained by one be lost by another, the distribution which will leave the greatest sum of happiness, is that which would favour the defendant to the exclusion of the plaintiff.

For, 1*st*, The sum lost, bearing a greater proportion to the reduced fortune than to the increased fortune, the diminution of happiness for the one will be greater than the increase of happiness to the other. In a word, equality would be violated by an opposite distribution. (See note upon Gaming: the case is exactly the same.)

2*d*, The loser experiences the pain of disappointed expectation: the other is simply in the condition of not having gained. But the negative evil of not having gained, is not equal to the positive evil of having lost. (If this were not the case, every man would experience this evil with regard to every thing which he did not obtain, and the causes of evil being infinite, every one ought to find himself infinitely miserable).

3*d*, Mankind in general appear to be more sensible of grief than pleasure from an equal cause. For example a loss which would diminish the fortune of an individual by one quarter, would take more from his happiness than would probably be added by a gain which should double it.*

2 *Prop.* Among unequal fortunes, if the loser is the poorest, the evil of the loss will be increased by this unequality.

3 *Prop.* If the loser is the richest, the evil caused by the attack upon security, will be in part compensated by the portion of good arising from the progress made towards equality.

By the assistance of these axioms, which have to a certain point the character and certainty of mathematical propositions, it will be possible at length to produce a regular and constant rule for indemnities and satisfactions. Legislators have often shown a disposition to follow the counsels of equality under the name of *equity*, to which greater latitude has been conceded than to *justice*: but this idea of equity, vague and ill developed, has rather seemed a matter of instinct than of calculation. It is only by much patience and order that a multitude of incoherent and confused sentiments can be reduced into rigorous propositions.

* It does not follow that the sum of evil is greater than that of good. Not only is evil more rare, but it is accidental: it does not arise, like good, from constant and necessary causes. Up to a certain point, also, it is in our power to repulse evil from, and attract good to, ourselves. There is also in human nature a feeling of confidence in happiness, which prevails over the fear of its loss: this is evidenced by the success of lotteries.

CHAPTER VII.

OF SECURITY.

WE have now arrived at the principal object of the Laws: the care of security. This inestimable good is the distinctive mark of civilization: it is entirely the work of the laws. Without law there is no security; consequently no abundance, nor even certain subsistence. And the only equality which can exist in such a condition, is the equality of misery.

In order rightly to estimate this great benefit of the Laws, it is only necessary to consider the condition of savages. They struggle without ceasing against famine, which sometimes cuts off in a few days whole nations: rivalry with respect to the means of subsistence, produces among them the most cruel wars; and, like the most ferocious beasts, men pursue men, that they may feed on one another. The dread of this horrible calamity destroys amongst them the gentlest sentiments of nature: pity connects itself with insensibility in putting the old persons to death, because they can no longer follow their prey.

Examine also what passes at those periods, during which civilized societies almost return into the savage state: I refer to a time of war, when the laws which give security are in part suspended. Every instant of its duration is fruitful in calamity: at every step which it imprints upon the globe, at every movement which it makes, the existing mass of riches, the foundation of abundance and subsistence, is decreased and disappears: the lowly cottage, and the lofty palace are alike subject to its ravages; and often the anger or caprice of a moment consigns to destruction the slow productions of an age of labour.

Law alone has accomplished what all the natural feelings were not able to do: Law alone, has been able to create a fixed and durable possession which deserves the name of Property. The law alone could accustom men to submit to the yoke of foresight, at first painful to be borne, but afterwards agreeable and mild: it alone could encourage them in labour — superfluous at present, and which they are not to enjoy till the future. Economy has as many enemies as there are spendthrifts, or men who would enjoy, without taking the trouble to produce. Labour is too painful for idleness; it is too slow for impatience: Cunning and Injustice underhandedly conspire to appropriate its fruits; Insolence and Audacity plot to seize them by open force. Hence Security, always tottering, always threatened, never at rest, lives in the midst of snares. It requires in the legislator, vigilance continually sustained, and power always in action, to defend it against his constantly reviving crowd of adversaries.

The Law does not say to a man, "*Work and I will reward you;*" but it says to him, "*Work*, and by stopping the hand that would take them from you, *I will ensure to you the fruits of your labour*, its natural *and sufficient reward, which, without me, you could not preserve.*" If industry creates, it is the law which preserves: if, at the first moment, we owe every thing to labour, at the second, and every succeeding moment, we owe every thing to the law.

In order to form a clear idea of the whole extent which ought to be given to the principle of security, it is necessary to consider, that man is not like the brutes, limited to the present time, either in enjoyment or suffering, but that he is susceptible of pleasure and pain by anticipation, and that it is not enough to guard him against an actual loss, but also to guarantee to him, as much as possible, his possessions against future losses. The idea of his security must be prolonged to him throughout the whole vista that his imagination can measure.

This disposition to look forward, which has so marked an influence upon the condition of man, may be called expectation — expectation of the future. It is by means of this we are enabled to form a general plan of conduct; it is by means of this, that the successive moments which compose the duration of life are not like insulated and independent points, but become parts of a continuous whole. Expectation is a chain which unites our present and our future existence, and passes beyond ourselves to the generations which follow us. The sensibility of the individual is prolonged through all the links of this chain.

The principle of security comprehends the maintenance of all these hopes; it directs that events, inasmuch as they are dependent upon the laws, should be conformed to the expectations to which the laws have given birth.

Every injury which happens to this sentiment produces a distinct, a peculiar evil, which may be called pain of disappointed expectation.

The views of jurists must have been extremely confused, since they have paid no particular attention to a sentiment so fundamental in human life: the word expectation is scarcely to be found in their vocabulary; an argument can scarcely be found in their works, founded upon this principle. They have followed it, without doubt, in many instances, but it has been from instinct, and not from reason.

If they had known its extreme importance, they would not have omitted to name it; to point it out, instead of leaving it in the crowd.

CHAPTER VIII.

OF PROPERTY.

THAT we may more completely estimate the advantage of the law, let us endeavour to form a clear idea of property. We shall see that there is no natural property — that property is entirely the creature of law.

Property is only a foundation of expectation — the expectation of deriving certain advantages from the thing said to be possessed, in consequence of the relations in which one already stands to it.

There is no form, or colour, or visible trace, by which it is possible to express the relation which constitutes property. It belongs not to physics, but to metaphysics: it is altogether a creature of the mind.

To have the object in one's hand — to keep it, to manufacture it, to sell it, to change its nature, to employ it — all these physical circumstances do not give the idea of property. A piece of cloth which is actually in the Indies may belong to me, whilst the dress which I have on may not be mine. The food which is incorporated with my own substance may belong to another, to whom I must account for its use.

The idea of property consists in an established expectation — in the persuasion of power to derive certain advantages from the object, according to the nature of the case.

But this expectation, this persuasion, can only be the work of the law. I can reckon upon the enjoyment of that which I regard as my own, only according to the promise of the law, which guarantees it to me. It is the law alone which allows me to forget my natural weakness: it is from the law alone that I can enclose a field and give myself to its cultivation, in the distant hope of the harvest.

But it may be said, What has served as a base to the law for the commencement of the operation, when it adopted the objects which it promised to protect under the name of property? In the primitive state, had not men a natural expectation of enjoying certain things — an expectation derived from sources anterior to the law?

Yes: they have had from the beginning, there have always been circumstances in which a man could secure by his own means the enjoyment of certain things: but the catalogue of these cases is very limited. The savage, who has hidden his prey, may hope to keep it for himself so long as his cave is not discovered; so long as he is awake to defend it; whilst he is stronger than his rivals: but this is all. How miserable and precarious is this method of possession! — Suppose, then, the slightest agreement among these savages reciprocally to respect each other's booty: this is the introduction of a

principle, to which you can only give the name of law. A feeble and momentary expectation only results from time to time, from purely physical circumstances; a strong and permanent expectation results from law alone: that which was only a thread in a state of nature, becomes a cable, so to speak, in a state of society.

Property and law are born and must die together. Before the laws, there was no property: take away the laws, all property ceases.

With respect to property, security consists in no shock or derangement being given to the expectation which has been founded on the laws, of enjoying a certain portion of good. The legislator owes the greatest respect to these expectations to which he has given birth: when he does not interfere with them, he does all that is essential to the happiness of society; when he injures them, he always produces a proportionate sum of evil.

CHAPTER IX.

ANSWER TO AN OBJECTION.

BUT perhaps the laws relating to property may be good for those who possess it, but oppressive to those who have none;—the poor are perchance more miserable than they would be without them.

The laws, in creating property, have created wealth; but with respect to poverty, it is not the work of the laws—it is the primitive condition of the human race. The man who lives only from day to day, is precisely the man in a state of nature. The savage, the poor in society, I acknowledge, obtain nothing but by painful labour; but in a state of nature, what could he obtain but at the price of his toil? Has not hunting its fatigues, fishing its dangers, war its uncertainties? And if man appear to love this adventurous life—if he have an instinct greedy of these kinds of perils—if the savage rejoice in the delights of an idleness so dearly purchased—ought it to be concluded that he is more happy than our day labourers? No: the labour of these is more uniform, but the reward is more certain: the lot of the woman is more gentle, infancy and old age have more resources; the species multiplies in a proportion a thousand times greater, and this alone would suffice to show on which side is the superiority of happiness. Hence the laws, in creating property, have been benefactors to those who remain in their original poverty. They participate more or less in the pleasures, advantages, and resources of civilized society: their industry and labour place them among the candidates for fortune: they enjoy the pleasures of acquisition: hope mingles with their labours. The security which the law gives them, is this of little importance? Those who look from above at the inferior ranks, see all objects less than they really are; but at the base of the pyramid, it is the summit which disappears in its turn. So far from making these comparisons, they dream not of them; they are not tormented with impossibilities: so, that all things considered, the protection of the laws contributes as much to the happiness of the cottage, as to the security of the palace. It is surprising that so judicious a writer as Beccaria should have inserted, in a work dictated by the soundest philosophy, a doubt subversive of the social order. *The right of property*, says he, *is a terrible right, and may not perhaps be necessary.* Upon this right, tyrannical and sanguinary laws have been founded. It has been most frightfully abused; but the right itself presents only ideas of pleasure, of abundance, and of security. It is this right which has overcome the natural aversion to labour—which has bestowed on man the empire of the earth—which has led nations to give up their wandering habits—which has created a love of country and of posterity. To enjoy quickly—to enjoy without punishment,—this is the universal desire of man; this is the desire which is terrible, since it arms all those who possess nothing, against those who possess any thing. But the law, which restrains this desire, is the most splendid triumph of humanity over itself.

CHAPTER X.

ANALYSIS OF THE EVILS RESULTING FROM ATTACKS UPON PROPERTY.

WE have already seen, that subsistence depends upon the laws, which secure to the labourers the products of their labour; but it would be proper more exactly to analyze the evils which result from violations of property. They may be reduced to four heads:—

1. *Evil of Non-possession.*—If the acquisition of a portion of riches be a good, the non-possession of it must be an evil; though a negative evil, and nothing more. Hence, although men in the condition of primitive poverty may not have felt the special privation of wealth which was unknown to them, it is clear that they at least had not all the happiness which results from it, and of which we are in the enjoyment.

The loss of a portion of good, should it even remain always unknown, would yet be a loss. If by calumny you prevent my friend from conferring a benefit upon me which I did not expect, do you not do me an injury? In what consists this injury? In the negative evil which results to me, of not possessing what I otherwise should have possessed but for your calumny.

2. *Pain of Loss.* — Every thing which I actually possess, or which I ought to possess, I consider in my imagination as about to belong to me for ever: I make it the foundation of my expectation — of the expectation of those who depend upon me, and the support of my plan of life. Each part of my property may possess, in my estimation, besides its intrinsic value, a value in affection — as the inheritance of my ancestors, the reward of my labours, or the future benefit of my heirs. Every thing may recall to me that portion of myself which I have spent there — my cares, my industry, my economy — which put aside present pleasures, in order to extend them over the future; so that our property may become, as it were, part of ourselves, and cannot be taken from us without wounding us to the quick.

3. *Fear of Loss.* — To regret for what is lost, uneasiness respecting what is possessed joins itself, and even for what it is possible to acquire; for most of the objects which are necessary for subsistence and abundance, being perishable matters, future acquisitions form a necessary supplement to present possessions.

When insecurity reaches a certain point, the fear of loss hinders the enjoyment of what is possessed. The care of preserving condemns us to a thousand sad and painful precautions, always liable to fail. Treasures fly away, or are buried: enjoyment becomes sombre, stealthy, and solitary: it fears, by the exhibition of itself, to direct cupidity to its prey.

4. *Destruction of Industry.* — If I despair of enjoying the fruits of my labour, I shall only think of living from day to day: I shall not undertake labours which will only benefit my enemies. But besides this, in order to the existence of labour, the will alone is not sufficient: instruments are wanting: whilst these are being provided, subsistence is necessary. A single loss may render me unable to act, without depriving me of the disposition to labour—without having paralyzed my will. Hence the three first of these evils affect the passive faculties of the individual, whilst the fourth extends to his active faculties, and strikes them with numbness.

It is perceived in this analysis, that the two first of these evils do not extend beyond the individual injured; but the two latter expand themselves, and occupy an indefinite space in society. An attack made upon the property of one individual spreads alarm among the other proprietors: this feeling is communicated from one to another, and the contagion may at last spread over the whole body of the state.

For the development of industry, the union of *power* and *will* is required. Will depends upon encouragement — power upon means. — These means are called, in the language of political economy, productive capital. — With regard to a single individual, his capital may be destroyed, without his industrious disposition being destroyed, or even weakened. With regard to a nation, the destruction of its productive capital is impossible: but long before this fatal term arrives, the mischief would have reached the will; and the spirit of industry would fall under a terrible *marasmus*, in the midst of the natural resources presented by a rich and fertile soil. The will, however, is excited by so many stimulants, that it resists a multitude of discouragements and losses: a passing calamity, how great soever it may be, does not destroy the spirit of industry. This has been seen springing up again after destructive wars, which have impoverished nations, like a robust oak, which in a few years repairs the injuries inflicted by the tempest, and covers itself with new branches. Nothing less is requisite for freezing up industry, than the operation of a permanent domestic cause, such as a tyrannical government, a bad legislation, an intolerant religion which repels men from each other, or a minute superstition which terrifies them.

The first act of violence will produce a certain degree of apprehension — there are already some timid minds discouraged: a second outrage, quickly succeeding, will spread a more considerable alarm. The most prudent will begin to contract their enterprises, and by degrees to abandon an uncertain career. In proportion as these attacks are repeated, and the system of oppression assumes an habitual character, the dispersion augments: those who have fled are not replaced; those who remain fall into a state of langour. It is thus that, after a time, the field of industry being beaten down by storms, becomes at last a desert.

Asia Minor, Greece, Egypt, the coasts of Africa, so rich in agriculture, commerce, and population, whilst the Roman Empire flourished — what have they become under the absurd despotism of the Turk? The palaces are changed into cabins, and the cities into small towns: this government, hateful to all persons of reflection, has never understood that a state can never become rich but by an inviolable respect for property. It has possessed only two secrets for governing — to drain and to brutify its subjects. Hence the finest countries in the world, wasted, barren, or almost abandoned, can scarcely be recognised in the hands of their barbarous conquerors. For these evils need not be attributed to remote causes: civil wars, invasions, the scourges of nature—these might have dissipated the wealth, put the arts to flight, and swallowed up the cities; but the ports which have been filled up, would have been reopened, the communications re-established, the manu-

factures revived, the towns rebuilt, and all these ravages repaired in time, if the men had continued to be men. But they are not so in these unhappy countries: despair, the slow but fatal effect of long-continued insecurity, has destroyed all the active powers of their souls.

If we trace the history of this contagion, we shall see that its first attacks fall upon the richest part of society. Wealth was the first object of depredation. Superfluity vanished by little and little: absolute necessity must still be provided for, notwithstanding obstacles: man must live; but when he limits his efforts to mere existence, the state languishes, and the torch of industry furnishes but a few dying sparks. Besides, abundance is never so distinct from subsistence, that the one can be injured without a dangerous attack upon the other: whilst some lose only what is superfluous, others lose what is necessary. From the infinitely complicated system of economical relations, the wealth of one part of the citizens is uniformly the source from which a more numerous party derives its subsistence.

But another, and more smiling picture, may be traced, and not less instructive, of the progress of security, and prosperity, its inseparable companion. North America presents the most striking contrast of these two states: savage nature is there placed by the side of civilization. The interior of this immense region presents only a frightful solitude: impenetrable forests or barren tracts, standing waters, noxious exhalations, venomous reptiles,—such is the land left to itself. The barbarous hordes who traverse these deserts, without fixed habitation, always occupied in the pursuit of their prey, and always filled with implacable rivalry, only meet to attack and to destroy each other; so that the wild beasts are not so dangerous to man, as man himself. But upon the borders of these solitudes, what a different prospect presents itself! One could almost believe that one saw, at one view, the two empires of good and evil. The forests have given place to cultivated fields; the morass is dried up; the land has become solid—is covered with meadows, pastures, domestic animals, smiling and healthy habitations; cities have risen upon regular plans; wide roads are traced between them: every thing shows that men are seeking the means of drawing near to one another; they no longer dread, or seek to murder each other. The seaports are filled with vessels receiving all the productions of the earth, and serving to exchange its riches. A countless multitude, living in peace and abundance upon the fruits of their labours, has succeeded to the nations of hunters who were always struggling between war and famine. What has produced these wonders? what has renovated the surface of the earth? what has given to man this dominion over embellished, fruitful, and perfectionated nature? The benevolent genius is *Security*. It is security which has wrought out this great metamorphosis. How rapid have been its operations! It is scarcely two centuries since William Penn reached these savage wilds with a colony of true conquerors; for they were men of peace, who sullied not their establishment by force, and who made themselves respected only by acts of benevolence and justice.

CHAPTER XI.

SECURITY AND EQUALITY — THEIR OPPOSITION.

IN consulting the grand principle of security, what ought the legislator to direct with regard to the mass of property which exists?

He ought to maintain the distribution which is actually established. This, under the name of justice, is with reason regarded as his first duty: it is a general and simple rule applicable to all states, adapted to all plans, even those which are most opposed to each other. There is nothing more diversified than the condition of property in America, England, Hungary, Russia: in the first country the cultivator is proprietor; in the second he is a farmer; in the third he is attached to the soil; in the fourth he is a slave. Still the supreme principle of security directs the preservation of all these distributions, how different soever their natures, and though they do not produce the same amount of happiness. For how shall a different distribution be made, without taking from some one what he possesses? how shall one party be stripped, without attacking the security of all? When your new distribution shall be disarranged, which it will be the day after its establishment, how will you be able to avoid making a second? Why should you not correct this also? and, in the meantime, what becomes of security? of happiness? of industry?

When security and equality are in opposition, there should be no hesitation: equality should give way. The first is the foundation of life—of subsistence—of abundance—of happiness; every thing depends on it. Equality only produces a certain portion of happiness: besides, though it may be created, it will always be imperfect; if it could exist for a day, the revolutions of the next day would disturb it. The establishment of equality is a chimera: the only thing which can be done is to diminish inequality.

If violent causes, such as a revolution in government, a schism, a conquest, produce the overthrow of property, it is a great calamity; but it is only transitory—it may be softened and even repaired by time. Industry is a vigorous plant, which resists numerous

loppings, and in which the fruitful sap rises immediately upon the return of spring. But if property were overthrown with the direct intention of establishing equality of fortune, the evil would be irreparable: no more security—no more industry—no more abundance; society would relapse into the savage state from which it has arisen.

"Devant eux des cités, derrière, eux des déserts."

Such is the history of fanaticism. If equality ought to reign to-day, for the same reason it ought to reign always. It can only be preserved by the same violences by which it was established. It would require an army of inquisitors and executioners, deaf both to favouritism and complaint—insensible to the seductions of pleasure—inaccessible to personal interest—endowed with every virtue, and engaged in a service which would destroy them all. The level must be in perpetual motion, in order to smooth down whatever would rise above the legal line. Watchfulness must be uninterrupted, to restore the lack of those who have dissipated their portion, and to strip those who by means of labour have augmented, or by care have preserved, theirs. In such a state of things, prodigality would be wisdom, and none but the mad would be industrious. This pretended remedy, so gentle in appearance, would thus be found a deadly poison. It is a burning cautery, which would consume every thing till it reached the last principles of life. The sword of the enemy, in its wildest fury, is a thousand times less to be dreaded. It only causes partial evils, which time effaces and which industry repairs.

Some small societies, in the first effervescence of religious enthusiasm, have instituted, as a fundamental principle, the community of goods. Has happiness been increased thereby? The gentle motive of reward has been supplied by the doleful motive of punishment. Labour, so easy and so light when animated by hope, has been represented as a penance necessary in order to escape from eternal punishments. Hence, so long as the religious motive preserves its force, every one labours, but every one groans. Does this motive grow weaker? The society divides itself into two classes: the one, degraded fanatics, contract all the vices of an unhappy superstition; the other, idle cheats, cause themselves to be supported in their idleness by the dupes by whom they surround themselves; whilst the cry for equality is only a pretext to cover the robbery which idleness perpetrates upon industry.

The prospects of benevolence and concord, which have seduced so many ardent minds, are, under this system, only the chimeras of the imagination. Whence should arise, in the division of labour, the determining motive to choose the most painful? who would undertake disagreeable and dirty tasks? who would be content with his lot, and not esteem the burthen of his neighbour lighter than his own? How many frauds would be attempted, in order to throw that burthen upon another, from which a man would wish to exempt himself? and in the division of property, how impossible to satisfy every one, to preserve the appearance of equality, to prevent jealousies, quarrels, rivalries, preferences? Who shall put an end to the numberless disputes always arising? What an apparatus of penal laws would be required, to replace the gentle liberty of choice, and the natural reward of the cares which each one takes for himself? The one half of society would not suffice to govern the other. Hence this iniquitous and absurd system could only be maintained by political or religious slavery, such as that of the Helots among the Lacedemonians, and the Indians of Paraguay in the establishments of the Jesuits. Sublime inventions of legislators, who, for the establishment of equality, made two equal lots of evil and of good, and put all the evil on one side, and all the good upon the other.

CHAPTER XII.

SECURITY AND EQUALITY—MEANS OF RECONCILIATION.

MUST there, therefore, be constant opposition, an eternal war between the two rivals, *Security* and *Equality*? Up to a certain point they are incompatible, but with a little patience and skill they may be brought by degrees to coincide.

Time is the only mediator between these contrary interests. Would you follow the counsels of equality without contravening those of security, wait for the natural period which puts an end to hopes and fears — the period of death.

When property is vacated by the death of the proprietors, the law may intervene in the distribution to be made, either by limiting in certain respects the power of disposing of it by will, with the design of preventing too great an accumulation of property in the hands of a single person, or by making the right of succession subservient to the purposes of equality, in case the deceased should not leave a husband, or wife, or relations, in the direct line, and should not have made use of his power of disposing of it by will. It passes then to new possessors, whose expectations are not formed, and equality may produce good to all, without deceiving the expectations of any. The principle only is indicated here: it will be more largely developed in the second Book.

When it regards the correction of a species of civil inequality such as slavery, the same

attention ought to be paid to the rights of property; the operation should be gradual, and the subordinate object should be pursued without sacrificing the principal object. The men whom you would render free by these gradations, will be much more fitted for its enjoyment, than if you had led them to trample justice under foot, in order to introduce them to this new social condition.

We may observe, that in a nation which prospers by agriculture, manufactures, and commerce, there is a continual progress towards equality. If the laws do not oppose it—if they do not maintain monopolies—if they do not restrain trade and its exchanges—if they do not permit entails—large properties will be seen, without effort, without revolutions, without shock, to subdivide themselves by little and little, and a much greater number of individuals will participate in the advantage of moderate fortunes. This will be the natural result of the different habits formed by opulence and poverty. The first, prodigal and vain, seeks only to enjoy without creating: the second, accustomed to obscurity and to privations, finds its pleasures in its labours and its economy. From this arises the change which is going on in Europe, from the progress of arts and commerce, notwithstanding the obstacles of the laws. The ages of feudality are not long since passed by, in which the world was divided into two classes—a few great proprietors who were every thing, and a multitude of slaves who were nothing. These lofty pyramids have disappeared or have been lowered, and their debris has been spread abroad: industrious men have formed new establishments, of which the infinite number proves the comparative happiness of modern civilization. Hence we may conclude, that *security*, by preserving its rank as the supreme principle, indirectly conducts to the establishment of *equality;* whilst this latter, if taken as the basis of the social arrangement, would destroy security in establishing itself.

CHAPTER XIII.

SACRIFICES OF SECURITY TO SECURITY.

THIS title at first appears enigmatical, but the enigma is soon solved.

An important distinction is to be made between the ideal perfection of security, and that perfection which is practicable. The first requires that nothing should be taken from any one; the second is attained if no more is taken than is necessary for the preservation of the rest.

This sacrifice is not an attack upon security; it is only a defalcation from it. An attack is an unforeseen shock; an evil which could not be calculated upon; an irregularity which has no fixed principle: it seems to put all the rest in danger; it produces a general alarm. But this defalcation is a fixed deduction—regular, necessary, expected—which produces an evil of the first order, but no danger, no alarm, no discouragement to industry: the same sum of money, according to the manner in which it is levied upon the people, will possess the one or the other of these characters, and will produce, in consequence, either the deadening effects of insecurity, or the vivifying effects of security.

The necessity of these defalcations is evident. To work, and to guard the workmen, are two different, and, for a time, incompatible operations. It is therefore necessary, that those who create wealth by their labour should give up a portion of it to supply the wants of the guardians of the state: wealth can only be defended at its own expense.

Society, attacked by internal or external enemies, can only maintain itself at the expense of the security, not only of these enemies themselves, but even of those in whose protection it is engaged.

If there are any individuals who perceive not this necessary connexion, it is because, in this respect, as in so many others, the wants of to-day eclipse those of to-morrow. All government is only a tissue of sacrifices. The best government is that in which the value of these sacrifices is reduced to the smallest amount. The practical perfection of security is a quantity which unceasingly tends to approach to the ideal perfection, without ever being able to reach it.

I shall proceed to give a catalogue of those cases in which the sacrifice of some portion of security, in respect of property, is necessary for the preservation of the greater mass:—

1. General wants of the state for its defence against external enemies.

2. General wants of the state for defence against delinquents or internal enemies.

3. General wants of the state for the prevention of physical calamities.

4. Fines at the expense of offenders, on account of punishment, on account of indemnities in favour of the parties injured.

5. Incroachment upon the property of individuals, for the development of the powers to be exercised against the above evils, by justice, by the police, by the army.

6. Limitations of the rights of property, or of the use which each proprietor may make of his own goods, in order to prevent his injuring himself or others.*

* A general right of property in any thing, is possessed, when it may be used every way, with the exception of certain uses which are forbidden by special reasons. These reasons may be referred to three heads:—

1. Private detriment—when a certain use of the thing would be injurious to a certain other

CHAPTER XIV.

CASES SUBJECT TO DISPUTE.

OUGHT provision for the poor, for public worship, and the cultivation of the arts and sciences, to be ranked among the wants of the state for which provision ought to be made by forced contributions?

§ 1. *Of Indigence.*

In the highest state of social prosperity, the great mass of the citizens will most probably possess few other resources than their daily labour, and consequently will always be near to indigence—always liable to fall into its gulf, from accident, from the revolutions of commerce, from natural calamities, and especially from disease: infancy will always be unable, from its own powers, to provide the means of subsistence; the decays of old age will often destroy these powers. The two extremities of life resemble each other in their helplessness and weakness. If natural instinct, humanity and shame, in concurrence with the laws, generally secure to infants and old persons the care and protection of their family, yet these succours are precarious, and those who give them may stand in need of similar succours themselves. A numerous family, supported in abundance by the labour of a man and his wife, may at any moment lose the half of its resources by the death of one of them, and lose the whole by the death of both.

Decay is still more badly provided for than childhood. The love which descends, has more power than that which ascends: gratitude is less powerful than instinct: hope attaches itself to the feeble beings who are commencing life, but has nothing more to say to those who are closing it. But even when the aged receive every possible comfort, the idea of exchanging the part of a benefactor, for that of the recipient of alms, pours somewhat of bitterness into favours received, especially when, from decay, the morbid sensibility of the mind has rendered painful, changes which would otherwise be indifferent.

This aspect of society is most painful. We picture to ourselves a long train of evils gathering round poverty, and followed up by death, under its most terrible forms, as their ultimate effect. We perceive that it is the centre towards which inaction alone makes the lot of every mortal to gravitate. Man can only rise by continued efforts, without which he will fall into this abyss; whilst these efforts are not always sufficient, and we see the most diligent, the most virtuous, sometimes sliding into it by a fatal declivity, or falling into it from inevitable reverses.

To put an end to these evils, there are only two methods independent of the laws—*economy*, and *voluntary contributions*.

If these two resourses were constantly sufficient, it would be proper to guard against the interference of the laws, for the assistance of the poor. The law which offers to poverty an assistance independent of industry, is, so to speak, a law against industry itself; or at least, against frugality. The motive to labour and economy is the pressure of present, and the fear of future, want: the law which takes away this pressure, and this fear, must be an encouragement to idleness and dissipation. This is the reproach which is reasonably brought against the greater number of establishments created for the poor.

But these two means are insufficient, as will appear upon a slight examination.

With respect to economy, if the greatest efforts of industry are insufficient for the daily support of a numerous class, still less will they be sufficient to allow of saving for the future. Others may be able, by their daily labour, to supply their daily returning wants; but these have no superfluity to lay by in store, that it may be used when required at a distant time. There only remains a third class, who can provide for every thing, by economizing during the period of labour, for the supply of the period in which they can no longer work. It is only with respect to this last class, that poverty can be esteemed a kind of crime, "Economy," it is said "is a duty. If they have neglected it, so much the worse for them. Misery and death may perhaps await them, but they can accuse only themselves: besides, their catastrophe will not be an evil wholly wasted; it will serve as a lesson to prodigals. It is a law established by nature—a law which is not, like those of men, subject to uncertainty and injustice. Punishment only falls upon the guilty, and is proportioned exactly to their fault." This severe language would

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individual, either in his fortune or otherwise. *Sic utere tuo ut alium non lædas. Sic utere tuo ut alienum non lædas.*

2. Public detriment:—such as may result to the community in general. *Sic utere tuo ut rem publicam non lædas.*

3. Detriment to the individual himself. *Sic utere tuo ut semet ipsum non lædas.*

This sword is mine in full property; but plenary as this property is as to a thousand uses, I may not use it in wounding my neighbour, nor cutting his clothes; I may not wave it as a signal of insurrection against the government. If I am a minor or a maniac, it may be taken from me, for fear that I should injure myself.

An absolute and unlimited right over any object of property would be the right to commit nearly every crime. If I had such a right over the stick I am about to cut, I might employ it as a mace to knock down the passengers, or I might convert it into a sceptre as an emblem of royalty, or into an idol to offend the national religion.

be justifiable, if the object of the law were vengeance: but this vengeance itself is condemned by the principle of utility, as an impure motive, founded upon antipathy. Again, what will be the fruit of these evils, this neglect, this indigence, which you regard in your anger as the just punishment of prodigality? Are you sure that the victims thus sacrificed will prevent, by their example, the faults which have led to their suffering?

Such an opinion shows little knowledge of the human heart. The distress, the death of certain prodigals — of those unhappy persons who have not been able to refuse themselves the infinitely little enjoyments of their condition, who have not learnt the painful art of striving by reflection against all the temptations of the moment — their distress I say, even their death itself, would have little influence, as instruction upon the laborious class of society. Is it possible that this sad spectacle, in which shame conceals the greater part of the details, should possess, like the punishment of malefactors, a publicity which should strike the attention, and permit no one to be ignorant of its cause? Would those to whom this lesson was most necessary, know how to give to such an event the proper interpretation? — would they always recognise the connexion between imprudence as the cause, and suffering as the effect? Might they not attribute this catastrophe to unforeseen accidents, which it was impossible to prevent? Instead of saying, Behold a man who has been the author of his own losses, and whose indigence ought to excite me to labour and economy without relaxation, — might it not often be said, with an appearance of reason, There is an unfortunate person, who has taken a thousand useless cares, and whose experience proves the vanity of human prudence. This would doubtless be bad reasoning: but ought an error in logic, a simple defect in reflection, among a class of men more called to the exercise of their hands than their heads, to be punished thus rigorously?

Besides, what should be thought of a punishment, retarded as to its execution even to the last extremity of life, which ought to begin by overcoming at the other extremity (that is to say, in youth) the ascendancy of the most imperious motives? How must this pretended lesson be weakened by the distance! — how small the analogy between an old and a young man! — how little does the example of the one operate upon the other! In the youth, the idea of immediate good and evil occupies nearly all the sphere of reflection, excluding the ideas of distant good and evil. If you would act upon him, place the motive near him; show him, for example, in perspective, a marriage, or any other pleasure: but a punishment placed at the extreme distance, beyond his intellectual horizon, is a punishment in pure waste. It is sought to guide those who think little; and in order to draw instruction from such a misfortune, it is requisite that they should think much: of what use, then, I ask, is a political instrument distined for the least prudent class, if it is of a nature to be efficacious only upon the wise?

Recapitulation.—The resource of economy is insufficient: — 1*st*, It is evidently so for those who do not earn a subsistence; 2*dly*, For those who earn only what is strictly necessary; whilst, as to the 3*d* class, which embraces all those who are not included in the two former, economy would not be insufficient of itself, but it may become so from the imperfection natural to human prudence.

Let us proceed to the other resource — *voluntary contributions.* This has many imperfections: —

1. Its uncertainty. It will experience daily vicissitudes, according to the fortune and the liberality of the individuals upon whom it depends. Is it insufficient? These conjunctures are marked by misery and death. Is it superabundant? It offers a reward to idleness and profusion.

2. The inequality of the burden. This supplement to the wants of the poor is formed entirely at the expense of the most humane, of the most virtuous individuals in the society, often without proportion to their means; whilst the avaricious calumniate the poor, in order to colour their refusal with a varnish of system and reason. Such an arrangement is, then, a favour granted to egotism, and a punishment against humanity, the first of virtues.

I say a punishment; for though these contributions bear the name of voluntary, what is the motive from which they emanate? If it be not founded on a religious or political fear, it is a tender, but painful sympathy, which presides over these acts of generosity. It is not the hope of a pleasure, which is purchased at this price; it is the torment of pity, from which we would be set free by this sacrifice: hence it has been observed in Scotland, where indigence is limited to this sad resource, that the poor find the greatest assistance among the class the least removed from poverty.

3. The inconveniences of the distribution. If these contributions are left to chance, as in the giving of alms upon the highway — if they are left to be paid on each occasion without intervention, by the individual giving to the individual asking — the uncertainty of the supply is aggravated by another uncertainty: How, in the multitude of cases, shall the degree of merit be appreciated? May not the penny of the poor widow only increase the ephemeral treasure of an abandoned woman? Will many generous hearts be found, who, with Sidney, will put back the vivifying cup

from their parched lips, saying, "I can wait — Think first of that unfortunate soldier, who has more need than I?" Can it be forgotten, that in the distribution of these fortuitous gratuities, it is not modest virtue, it is not honest poverty, often silent and bashful, which obtains the largest share? To be successful upon this obscure theatre, management and intrigue are as necessary as in the more brilliant theatre of fashion. Those who are importunate — who flatter, who lie — who mingle, according to the occasion, boldness and baseness, and change their impostures,— will obtain success, which indigent virtue, devoid of artifice, and preserving its honour in the midst of its misery, will never attain.

"Les vrais talens se taisent et s'enfuient
Découragés des affronts qu'ils essuient
Les faux talens sont hardis effrontés
Souples, adroits, et jamais rebutés."

What Voltaire here says of talents may be applied to mendicity. In the indiscriminate distribution of voluntary contributions, the share of honest and virtuous poverty will be seldom equal to that of the impudent and bold beggar.

Shall these contributions be placed in a common fund, to be afterwards distributed by chosen individuals? This method would be much to be preferred, since it permits a regular examination of wants and persons, and tends to proportion assistance to them; but it has also a tendency to diminish liberality. This benefit, which must be received at the hand of strangers, the application of which I cannot follow, from which I do not derive either the pleasure or the immediate merit, has something abstract in it, which chills the feelings: what I give myself, I give at the moment when I am moved, when the cry of poverty has entered into my heart, when there was no one but me to assist it. What I contribute to a general collection may not have a destination conformable to my wishes. This penny, which is much for me and my family to contribute, will only be as a drop in the ocean of contribution on the one hand, and in the ocean of wants on the other hand: it becomes the rich to succour the poor. In this manner many will reason, and it is on this account that collections succeed better when they are made for a determinate class of individuals than for an indefinite multitude, as the whole mass of the poor. It is, however, for this mass that it is necessary to secure permanent assistance.

From these considerations it appears, that it may be laid down as a general principle of legislation, that a regular contribution should be established for the wants of indigence; it being well understood that those only ought to be regarded as indigent, who are in want of necessaries. But from this definition it follows, that the title of the indigent, as indigent, is stronger than the title of the proprietor of a superfluity, as proprietor; since the pain of death, which would finally fall upon the neglected indigent, will always be a greater evil than the pain of disappointed expectation, which falls upon the rich when a limited portion of his superfluity is taken from him.*

With regard to the amount of a legal contribution, it ought not to exceed simple necessaries: to exceed this would be to punish industry for the benefit of idleness. Establishments which furnish more than necessaries, are only good when supported at the expense of individuals, because they can use discretion in the distribution of their assistance, and apply it to specific classes.

The details of the manner of assessing this contribution and distributing its produce, belong to political economy; in the same manner as inquiries respecting the methods of encouraging the spirit of economy and foresight among the inferior classes of society. We have, upon this interesting subject, instructive memoirs, but no treatise which embraces the whole question.† It would be necessary to commence with the theory of poverty; that is to say, by the classification of the indigent, and the causes which produce indigence, and to proceed to the adoption of precautions and remedies.

§ 2. *Of the Expense of Public Worship.*

If the ministers of religion are considered as charged with the maintenance of one of the sanctions of morality (the religious sanction), the expense of their support ought to be referred to the same head as the expenses of police and justice — to that of internal security. They are a body of inspectors and teachers of morals, who form, so to speak, the advanced guard of the law; who possess no power over crime, but who combat with the vices out of which crimes spring; and who render the exercise of authority more rare, by maintaining good conduct and subordination. If they were charged with all the functions which might suitably be assigned to them, such as the education of the inferior classes, the promulgation of the laws, the promulgation of different public acts, the utility of their services would be more manifest.

* If this deduction were established upon a fixed footing, each proprietor, knowing beforehand what he would have to give, the pain of disappointment would disappear, and make way for another pain, a little different in its nature, and less in its degree.

† In 1797, Mr. Bentham addressed a letter on pauper management to Mr. Arthur Young, editor of the Annals of Agriculture, which was inserted in that work, and afterwards translated and published in Paris, an. X. under the title of "Esquisse d'un ouvrage en faveur des Pauvres."

The greater the number of real services they render to the state, the less will they be subject to the diseases of dogmas and controversies, which are engendered by a desire of distinction, and the impossibility of being useful. Their activity and ambition being directed to useful objects, would prevent their becoming mischievous.

In this respect, even those who do not acknowledge the foundations of the religious sanction cannot complain, when called upon to contribute to its support, since they participate in its advantages.

But if there be in a country a great diversity of religious professions, and the legislator is not bound by a previous establishment, or by particular considerations, it will be more conformable to liberty and equality, to apply to the support of each church the contribution of each religious community. The zeal of proselytism on the part of the clergy may, it is true, in this case, be apprehended; but it will also be probable, that from their reciprocal efforts a useful emulation will result, and that by balancing their influence, a species of equilibrium will be established in this ocean of opinions, otherwise so subject to dangerous tempests.

An unfortunate case* may be imagined: that of a people to whom the legislator has denied the public exercise of their religion, and at the same time imposed upon them the obligation of supporting a religion which they consider as opposed to their own. This would be double violation of security. In such a people we must expect to find a sentiment formed, of habitual hatred against its government, a desire of change, a ferocious courage, a profound secrecy. The people, deprived of all the advantages of a public religion, of known guides, of acknowledged priests, would be given up to ignorant and fanatical chiefs; and as the support of this worship would be a school of conspiracy, the use of an oath, instead of being the security of the state would become a source of terror; instead of binding the citizens to the government, it would unite them against it, so that this people would become as formidable from its virtues as its vices.

§ 3. *Of the Cultivation of the Arts and Sciences.*

I do not here speak of what may be done for what may be designated the *useful arts and sciences:* no one doubts but that objects of public utility ought to be supported by public contributions.

But with regard to the cultivation of the fine arts, of the embellishment of a country, of buildings of luxury, of objects of ornament and pleasure — in a word, for these works of supererogation, ought forced contributions to be levied? Can the imposition of taxes, which have no other than this brilliant but superfluous destination, be justified?

I would not plead here, for that which is agreeable, in opposition to what is useful,† nor justify the starving of the people, to give feasts to a court, or pensions to buffoons. But one or two reflections may be presented, by way of apology: —

1. The amount expended, and which can be expended, upon these objects, is commonly but little, compared with the mass of necessary contributions. If any one should advise that his portion of this superfluous expense should be returned to each person, would it not be an impalpable object?

2. This supererogatory part of the taxes, being confounded with the mass of those which are necessary, its collection is imperceptible: it does not excite any distinct sensation, which can give rise to any distinct complaint; and the evil of the first order, being limited to so trifling an amount, is not sufficient to produce an evil of the second order.

3. This luxury of pleasure may have a palpable utility, by attracting a concourse of foreigners, who will spend their money in the country, and thus other nations will by degrees, be made tributary to that which sways the sceptre of fashion. A country fertile in amusements, may be considered as a great theatre, which is supported in part at the expense of a crowd of spectators attracted from all parts.

It may even happen that this pre-eminence in the objects of pleasure, of literature, and of taste, may tend to conciliate to a nation the benevolence of other nations. Athens, which has been called the Eye of Greece, was more than once saved by this sentiment of respect, which its superiority of civilization inspired. A crown of glory, which surrounded this land of the fine arts, served for a long time to conceal its weakness; and every thing which was not barbarous was interested in the preservation of this city, the centre of politeness and mental enjoyment.

After all, it must be acknowledged that this seductive object may be abandoned, without risk, to the single resource of voluntary contributions. At least, nothing essential ought to have been neglected, before expenses of mere ornament are undertaken. Come-

* This was once not an imaginary case: it was the case of Ireland.

† I do not mean that there is a real opposition between the useful and the agreeable: every thing which gives pleasure is useful; but in ordinary language, that is exclusively called *useful* which possesses a distant utility; that *agreeable*, which has an immediate utility, or is limited to present pleasure. Very many things, whose utility is contested, have therefore a more certain utility than those to which this denomination is appropriated.

dians, painters, architects may be employed, when the public credit is satisfied, when individuals have been indemnified for the losses occasioned by wars, by crimes, and physical calamities, when the support of the indigent has been provided for: until then, a preference accorded to these brilliant accessories, over these objects of necessity, cannot be justified.

It is even extremely contrary to the interest of the sovereign, inasmuch as reproaches are always exaggerated, because thought is not required in making them, but only passion and temper. The extent to which these topics have been employed in our days, in certain writings, for the purpose of exciting the people against the government of kings, is well known. But though every thing conspires, in this respect, to throw princes into the illusion, have they fallen into the same excesses, with regard to the luxury of amusements, as many republics? Athens, at the period of its greatest dangers, disregarding equally the eloquence of Demosthenes and the threats of Philip, recognised a want more pressing than its defence — an object more essential than the maintenance of its liberty: the greatest neglect of duty consisted in diverting, even for the good of the state, the funds destined for the use of a theatre. And at Rome, the passion for shows was carried almost to madness. It became necessary to waste the treasures of the world, and to strip the subject nations, in order to captivate the suffrages of the majesty of the people. Terror was spread through a whole country, because a proconsul had to give a fête at Rome; one hour of the glories of the circus threw a hundred thousand of the inhabitants of the provinces into despair,

CHAPTER XV.

EXAMPLES OF ATTACKS UPON SECURITY.

It will not be useless to give some examples of what I call *attacks upon security*. It will be a means of more clearly exhibiting the principle, and of showing that what is called unjust in morals, cannot be innocent in politics. Nothing has been more common than to authorize under one name that which would be odious under the other.

I cannot refrain from noticing here the ill effects of one branch of classical education. Youth are accustomed from their earliest days to see, in the history of the Roman people, public acts of injustice, atrocious in themselves, always coloured under specious names, always accompanied by a pompous eulogium respecting Roman virtues. The abolition of debts occupies a conspicuous place in the early transactions of the Republic. A return of the people to mount Aventine obliged the Senate to pass the sponge over all the rights of creditors. The historian excites all our interest in favour of the fraudulent debtors who discharged their debts by a bankruptcy, and does not fail to render those odious who were thus despoiled by an act of violence. What end was answered by this iniquity? The usury, which had served as a pretext for this theft, was only augmented on the morrow by this catastrophe; for the exorbitant rate of interest was only the price paid for the risks attached to the uncertainty of engagements. The foundation of their colonies has been boasted of as the work of a profound policy: it consisted always in stripping the legitimate proprietors, in a conquered country, in order to create establishments of favour or reward. This exercise of power, so cruel in its immediate effects, was disastrous also in its consequences. The Romans, accustomed to violate all the rights of property, knew not where to stop in this course. From hence arose that perpetual demand for a new division of the lands, which was the perpetual firebrand of the seditious, which contributed, under the Triumvirs, to a dreadful system of general confiscations.

The history of the Grecian Republics is full of facts of the same kind, always presented in a plausible manner, and calculated to mislead superficial minds. How has reasoning been abused, respecting the division of the lands carried into effect by Lycurgus, to serve as a foundation of his warrior institution, in which, through the most striking inequality, all the rights were on one side and all the servitude on the other.*

The *attacks upon security*, which have found so many officious defenders when made by the Greeks and Romans, have not experienced the same indulgence when they have been made by the monarchs of the East. The despotism of a single person has nothing seducing, because it too evidently refers to himself alone, and because there are a million chances of suffering to one of enjoying. But the despotism exercised by the multitude deceives feeble minds by a false image of public good: they place themselves, in imagination, among the great number who command, instead of supposing themselves among the small number who give up and who suffer. Leaving, therefore, the sultans and viziers in peace, we may reckon that their injustices will not be coloured by the flatteries of histo-

* It appears, that of all the establishments of Lycurgus, this division of lands was that which experienced the least resistance. This singular phenomenon can only be explained by supposing, that during a long anarchy, property had almost lost its value. Even the rich might gain by this operation, because ten acres *secure* are worth more than a thousand *insecure*.

rians: their reputation serves as an antidote to their example.

For the same reason, we need not insist upon such attacks as national bankruptcies; but we may remark, in passing, a singular effect of fidelity to engagements, with respect to the authority even of the sovereign. In England, since the revolution, the engagements of the state have always been sacred. Hence the individuals who have treated with the government have never required any other pledge than their mortgage upon the revenue, and the collection of the revenue has remained in the hands of the king. In France, under the monarchy, the violations of the public faith were so frequent, that those who made advances to the government were for a long time in the habit of themselves collecting the taxes, and paying themselves with their own hands. But their intervention was costly to the people, whom they had no interest in sparing, and still more to the king, whom they robbed of the affection of his people. When the announcement of a deficiency alarmed all the creditors of the state, this class, so interested in England in the maintenance of the government, in France, showed itself desirous of a revolution. Each one believed he saw his security in taking from the sovereign the administration of the finances, and placing it in the hands of a national council. In what manner the event corresponded with their hopes, is well known. But it is not the less interesting to observe, that the downfal of this monarchy, which appeared immoveable, was owing, in the first instance, to mistrust, founded upon many violations of public faith.

But amid so many *attacks upon security*, made through ignorance, from inadvertency, or from false reasons, we shall content ourselves with pointing out a few:—

1. We may consider under this point of view, *all mis-seated taxes*; for example, disproportioned taxes, which spare the rich to the prejudice of the poor. The weight of this evil is further aggravated by a feeling of injustice, when one is obliged to pay more than would be required, if all others interested paid in the same proportion.

Statute labour is the height of inequality, when it falls upon those who have only their hands for their patrimony.

Taxes levied upon uncertain funds, upon persons who may not have wherewith to pay. The evil then takes another direction: the individual being unable to pay the tax on account of his indigence, finds himself subject to graver evils. Instead of the inconveniences of the tax, the sufferings of privation are experienced: for this reason, a capitation tax is bad; because a man has a head, it does not follow that he has any thing else.

Taxes which restrain trade; monopolies; close corporations. The true method of estimating these taxes is not by considering what they yield, but what they prevent the acquisition of.

Taxes upon the necessaries of life, which may be followed by physical privations, diseases, and even death itself; and no one perceive the cause. These sufferings, caused by an error in government, become confounded with natural evils which cannot be prevented.

Taxes upon the sale of lands alienated during life. It is want, in general, which leads to these sales; and the exchequer, by intervening at this period of distress, levies an extraordinary fine upon an unfortunate individual.

Taxes upon public sales; upon goods sold by auction. Here the distress is clearly proved: it is extreme, and the fiscal injustice is manifest.

Taxes upon law proceedings. These include all kinds of *attacks upon security*, since they amount to a refusal of the protection of the law, to all those who cannot pay for them. They consequently offer a hope of impunity to crime: the criminal has only to choose, for the object of his injustice, individuals who cannot afford to furnish the advances for a judicial suit, or to run its risks.

2. *The forced raising of the value of money*, another attack upon security. This is a bankruptcy, since it is not paying all that is due; a fraudulent bankruptcy, since there is a semblance of payment; and an unskilful fraud, since it deceives no one. It is also proportionably an abolition of debts; for the theft that the prince practises upon his creditors, he authorizes every debtor to practise upon his own, without producing any advantage to the public treasury. Is this course of injustice accomplished? The operation, after having weakened confidence, ruined the honest citizens, enriched the rogues, deranged commerce, disturbed the system of taxes, and caused a thousand evils to individuals, does not leave the least advantage to the government which is dishonoured by it. Expense and receipt are all altered in the same proportions.

3. *Forced reduction of the rate of interest.* Viewed as a question of political economy, the reduction of the rate of interest by a law is an injury to the public wealth, because it acts as a prohibition of particular premiums for the importation of foreign capital: it acts as a prohibition, in many cases, of new branches of commerce, and even of old ones, if the legal rate of interest be not sufficient to balance the risks of the capitalists.

But viewed in relation to the more immediate question of security, it is to take from the lenders, to give to the borrowers. When the rate of interest is reduced a fifth, the effect as to the lenders is the same as if they

were every year stripped by robbers of the fifth part of their fortune.

If the legislator find it good to take from a particular class of citizens a fifth of their revenue, why should he stop there? — why not take another fifth — and yet another? If this first reduction answer its end, the last reduction will answer it in the same proportion; and if the measure be good in the one case, why should it be bad in the other? When he stops, he ought to have a reason for stopping; but the reason which would hinder him from taking the second step, ought to be sufficient to prevent his taking the first.

This operation resembles an act by which the rent of land should be diminished, under pretence that the proprietors are useless consumers, and the farmers productive labourers.

If you shake the principle of security as to one class of citizens, you shake it as to all: the bundle of concord is its emblem.

4. *General confiscations.* I refer to this head those vexations exercised upon a sect, upon a party, upon a class of men, under the vague pretence of some political offence, in such manner that the imposition of the confiscation is pretended to be employed as a punishment, when in truth the crime is only a pretence for the imposition of the confiscation. History presents many examples of such robberies. The Jews have often been the object of them: they were too rich not to be always culpable. The financiers, the farmers of the revenue, for the same reason, were subjected to what were called *burning chambers.* When the succession to the throne was unsettled, every body, at the death of the sovereign, might become culpable, and the spoils of the vanquished formed a treasury of reward in the hands of the successor. In a republic torn by factions, one half of the nation became rebels in the eyes of the other half. When the system of confications was admitted, the parties, as was the case at Rome, alternately devoured each other.

The crimes of the powerful, and especially the crimes of the popular party in democracies, have always found apologists. "The greater part of these large fortunes," it has been said, "have been founded in injustice and that was only restored to the public which had been stolen from the public." To reason in this manner, is to open an unlimited career to tyranny: it is to allow it to presume the crime, instead of proving it. By means of this logic, it is impossible to be rich and to be innocent. Ought so grave a punishment as confiscation to be inflicted by wholesale, without examination, without detail, without proof? A procedure which would be deemed atrocious if it were employed against a single person — does it become lawful when employed against an entire class of citizens? Can the evil which is done be disregarded, because there is a multitude of sufferers, whose cries are confounded together in their common shipwreck? To despoil the great proprietors, upon pretence that some one of their ancestors acquired their wealth by unjust methods, is to bombard a city because it is suspected that it encloses some thieves.

5. *Dissolution of monastic orders and convents.* The decree for their abolition was signed by reason itself; but its execution ought not to have been abandoned to prejudice and avarice. It would have been enough to prohibit these societies from receiving new members. They would thus have been gradually abolished: individuals would not have suffered any privation. The successive savings might have been applied to useful objects; and philosophy would have applauded an operation excellent in principle, and gentle in execution. But this slow proceeding is not that followed by avarice. It seems that the sovereigns, in dissolving these societies, have sought to punish the individuals for wrongs which they had received from the societies. Instead of considering them as orphans and invalids, who deserved all the compassion of the legislator, they looked upon them as enemies who were treated with favour, when, though reduced from opulence, they were allowed simple necessaries.

6. *Suppression of places and pensions, without indemnifying the individuals who had possessed them.* This kind of attack upon security deserves more particular mention, because, instead of being blamed as an injustice, it is often approved as an act of good government and economy. Envy is never more at ease than when it is able to conceal itself under the mask of the public good: but the public good only demands the reform of useless places — it does not demand the misery of the individuals holding the place reformed.

The principle of security requires, that in all reforms the indemnity should be complete. The only benefit that can be legitimately derived from them is limited to the conversion of perpetual into transitory charges.

Is it said, that the immediate suppression of these places is a gain to the public? It would be a sophism. The sum in question would without doubt, considered in itself, be a gain if it came from abroad, if it were gained by commerce, &c; but it is not a gain when drawn from the hands of certain individuals who form a part of the public. Would a family be enriched because the father had taken every thing from one of his children, the better to endow the others? But even in this case, the stripping of one son would increase the inheritance of his brothers: the

evil would not be pure loss; it would produce some portion of good. But when it refers to the public, the profit of a suppressed place is divided among all, whilst the loss presses altogether upon a single person. The profit spread among the multitude divides itself into impalpable parts; the whole loss is felt by him who supports it alone. The result of the operation is in no respect to enrich the the party who gains, but to impoverish him who loses. Instead of one place suppressed, suppose a thousand, ten thousand, a hundred thousand: the total disadvantage remains the same. The spoil taken from thousands of individuals must be divided among millions: your public places would every where present you with unfortunate citizens, whom you would have plunged into indigence; whilst you would scarcely see a single individual sensibly enriched by these cruel operations. The groans of sorrow and the cries of despair would resound on all sides: the shouts of joy, if there were any such, would not be the expression of happiness, but of the antipathy which rejoices in the misery of its victims. Ministers of kings and of the people, it is not by the misery of individuals that you can procure the happiness of nations: the altar of the public good does not demand more barbarous sacrifices than that of the Divinity.

I cannot yet quit this subject; it appears so essential, for the establishment of the principle of security, to trace the error into all its retreats.

How do individuals deceive themselves or others with regard to such great injustice? They have recourse to certain pompous maxims, in which there is a mixture of truth and falsehood, and which give to a question, in itself simple, an air of profundity and political mystery. "The interest of individuals," it is said, "ought to give way to the public interest." But what does this mean? Is not one individual as much a part of the public as another? This public interest which you personify, is only an abstract term: it represents only the mass of the interests of individuals. They ought all to be taken account of, instead of considering some as every thing, and the rest as nothing. If it be proper to sacrifice the fortune of one individual, in order to augment the fortune of others, it would be still better to sacrifice a second, a third, even a hundred, even a thousand, without it being possible to assign any limits; for whatever may be the number of those you have sacrificed, you always have the same reason for adding one more. In a word, the interest of the first is sacred, or the interest of no one can be so.

Individual interests are the only real interests. Take care of individuals; never injure them, or suffer them to be injured, and you will have done enough for the public. Can it be conceived that there are men so absurd as to love posterity better than the present generation; to prefer the man who is not, to him who is; to torment the living, under pretence of promoting the happiness of those who are not born, and who may never be born?

In a multitude of occasions, the men who suffer by the operation of any law have not dared to make themselves heard, or have not been listened to, on account of this obscure and false notion, that private interest ought to give way to the public interest. But if this were a question of generosity, who ought the rather to exercise it? All towards one, or one towards all? Who, then, is the greatest egotist—he who desires to preserve what he has? or he who wishes to take, and even to seize by force, that which belongs to another? An injury felt, and a benefit not felt, such is the result of these fine operations in which the interest of individuals is sacrificed to that of the public.

I conclude by a grand general consideration. The more the principle of property is respected, the more is it strengthened in the minds of the people. Small attacks upon this principle prepare for greater. It has required a long period to attain to the point at which we have arrived in civilized society; but fatal experience has shown with what facility security may be overturned, and how the savage instinct of robbery may assume an ascendancy over the laws. The people and governments are in this respect only like tame lions: if they taste blood, their natural ferocity is rekindled:—

"Si torrida parvus
Venit in ora cruor, redeunt rabiesque furorque:
Admonitæque tument gustato sanguine fauces
Fervet, et à trepido vix abstinet ira magistro."
LUCAN, iv.

CHAPTER XVI.

OF FORCED EXCHANGES.

"ACCORDING to Xenophon, Astyages once asked of Cyrus an account of his last lesson: There was, said he, in our school a great boy, who, having a little coat, gave it to one of his companions who was of small stature, and took from him his coat, which was larger: our master having made me the judge in this quarrel, I decided that things should be left as they were, and that the one and the other would thus be better accommodated in this respect: upon which he showed me that I had decided wrongly, for I had only considered what was fitting, whilst I ought, in the first place, to have provided for what was just, which would not allow any one to be forced with regard to what belonged to him." Montaigne's Essays, Book 1. ch. 24.

Let us see what ought to be thought of this decision. At the first glance it seems that a forced exchange is not contrary to security, provided that an equal value is received. How can I have lost in consequence of the law, if, after it has had its full effect, the mass of my fortune remain the same as before? If one has gained, without another having lost, the operation appears good.

No: it is not. He whom you consider to have lost nothing by the forced exchange, has really experienced a loss. As all things, moveable and immoveable, may have different values to different persons, according to circumstances, every one expects to enjoy the favourable chances which may augment the value of any part of his property. If the house which Peter occupies is of greater value to Paul than to Peter, this would not be a good reason for gratifying Paul, by obliging Peter to give it up to him, for what might be of the same value to him. This would be to deprive Peter of the natural benefit which he might have expected to derive from this circumstance.

But if Paul should say, that for the benefit of peace, he has offered a price above the ordinary value of the house, and that his adversary only refuses from obstinacy; it may be replied to him, This surplus, that you pretend to have offered, is only a supposition on your part: the contrary supposition is just as probable: for if you have offered more than the house is worth, he would have hastened to seize so fortunate a circumstance, which might never recur, and the bargain would have soon been concluded to his satisfaction: if he does not accept it, it is a proof that you have been deceived in the estimation you have made, and that if you take his house from him, upon the conditions you have proposed, his fortune will be injured, if not with reference to what he possesses, at least with reference to what he has a right to require.

No, replies Paul; he knows that my valuation is higher than any he can expect in the ordinary course of things: but he knows my necessity, and he refuses a reasonable offer, in order to derive an abusive advantage from my situation.

The following principle may serve to remove the difficulty between Peter and Paul. Things may be distinguished into two classes: those which have commonly only an intrinsic value, and those which are susceptible of a value in affection. Ordinary houses, a field cultivated in an ordinary manner, a stack of corn or hay, the common productions of manufactures, appear to belong to this first class. To the second may be referred a pleasure-garden, a library, statues, pictures, collections of natural history. As to objects of this kind, the exchange ought never to be forced: it is not possible to appreciate the value that the feeling of affection may give them. But objects of the first class may be subjected to forced exchanges, if this be the only method of preventing great losses. I possess an estate of considerable value, to which I can only go by a road which borders on a river. The river overflows and destroys the road: my neighbour obstinately refuses me a passage over a strip of land which is not worth one hundredth part of my estate: ought I to lose all my benefit, from the caprice or the enmity of an unreasonable man?

But to prevent the abuse of so delicate a principle, it would be proper to lay down strict rules. I say, then, that exchanges may be forced, in order to prevent great loss; as in the case of land rendered inaccessible, unless a passage is taken across that of a neighbour.

It is in England that all the scruples of the legislator in this respect should be observed, in order to understand all the respect which ought to be borne to property. Is a new road to be opened? In the first place, an act of parliament is necessary, and all the parties interested are heard: afterwards the assignment of an equitable indemnity only to the proprietors is not considered sufficient; but with regard to objects which may possess a value in affection, such as houses and gardens, they are protected against the law itself by being recognised as exceptions.

These operations may also be justified, when the obstinacy of an individual, or a small number of persons, is manifestly injurious to the advantage of a great number. It is thus that the inclosure of commons in England is not stopped by certain oppositions, and that, for the convenience and salubrity of towns, the sale of houses is often forced by law.

The question discussed here relates only to forced exchanges, and not to forcible removals; for a removal which should not be an exchange—a removal without an equivalent, were it even for the profit of the state, would be a pure injustice, an act of power devoid of the softening necessary to reconcile it with the principle of utility.

CHAPTER XVII.

POWER OF THE LAWS OVER EXPECTATION.

THE legislator is not the master of the dispositions of the human heart: he is only their interpreter and their servant. The goodness of his laws depends upon their conformity to the general *expectation*. It is highly necessary, therefore, for him rightly to understand the direction of this expectation, for the purpose of acting in concert with it. Such is the object in view: let us proceed to the exa-

mination of the conditions necessary for its accomplishment.

1. The first of these conditions, but at the same time the most difficult to be attained, is, that *the laws may be anterior to the formation of the expectation.* If we could suppose a new people, a generation of children: the legislator, finding no expectations formed which could oppose his views, might fashion them at his pleasure, as the sculptor fashions a block of marble. But as there already exists among all people a multitude of expectations, founded upon ancient laws or ancient usages, the legislator is obliged to employ a system of conciliations and concessions, which constantly restrain him.

The first laws themselves have always found some expectations formed; for we have seen, that before the laws there existed a feeble kind of property; that is to say, a certain expectation of keeping what each one had acquired: hence the laws have received their first direction from these anterior expectations; they have given birth to new ones, they have excavated the bed in which desires and hopes have flowed. It is no longer possible to make any change in the laws of property, without more or less disturbing the established current, and without its opposing a greater or less resistance.

Do you wish to establish a law in opposition to the actual expectations of men? If it is possible, let it begin to have effect at a distant period: the present generation will perceive no change, and the rising generation will be all prepared for it; you will find among its youth, auxiliaries against the ancient opinions; you will not injure existing interests, because they will have leisure to prepare for the new order of things. Every thing will become smooth before you, because you will have prevented the birth of expectations which would have been opposed to you.

2. Second condition — *Let the laws be known.* A law which is unknown can have no effect upon expectation: it does not serve to prevent an opposite expectation.

This condition, it may be said, does not depend upon the nature of the law, but upon the measures taken for its promulgation. These measures may be sufficient for their object, whatever may be the law.

This reasoning is more specious than true. There are some laws naturally more easily understood than others; such are, laws conformable to expectations already formed; laws which repose upon *natural* expectations. This natural expectation, this expectation produced by early habit, may be founded upon superstition, upon a hurtful prejudice, or upon a sentiment of utility: this is of no importance; the law which is conformed to it maintains its place in the mind without effort; it was there, so to speak, before it was promulgated; it was there before it received the sanction of the legislator. But a law opposed to this natural expectation, is understood with much greater difficulty, and is with still greater difficulty imprinted upon the memory: it is another disposition of things, which always presents itself to the mind; whilst the new law, altogether strange, and without roots, tends incessantly to slip from the place in which it is only artificially fixed.

Codes of ritual observances, among others, possess this inconvenience, that their fantastic and arbitrary rules, never being well known, fatigue the understanding and the memory; and the subject of them, always fearing, always at fault, always fancying himself morally diseased, can never reckon upon his innocence, and lives in want of perpetual absolutions.

Natural expectation directs itself towards the laws which are most important to society; and the foreigner who should be guilty of theft, fraud, or assassination, would not be permitted to plead his ignorance of the laws of the country, because he could not but have known that acts, so manifestly hurtful, were every where considered as crimes.

3. Third condition — *That the laws should be consistent with themselves.* This principle has a close relation with the preceding one; but it will serve to place a great truth in a new light. When the laws have established a certain arrangement upon a principle generally admitted, every arrangement in conformity with this principle will naturally be conformable to the general expectation. — Every analogous law is, so to speak, presumed beforehand: every new application of the principle contributes to strengthen it. But a law which does not possess this character dwells alone, as it were, in the mind, and the influence of the principle to which it is opposed is a power which incessantly tends to expel it from the memory.

That at the death of a man, his goods should be transmitted to his nearest relations, is a rule generally admitted, to which expectations naturally direct themselves. A law respecting successions, which should be consistent with this rule, would obtain general approbation, and would be understood by every mind. But the more this principle is disregarded, by the admission of exceptions, the more difficult it will be to comprehend and to retain them. The *Common Law* of England offers a striking example. It is so complicated with regard to the descent of property; it admits distinctions so singular; the previous decisions, which serve to regulate it, are so subtilized, that not only is it impossible for simple good sense to presume them, it is also difficult for it to comprehend them. It is a study profound as that of the most abstract sciences: it belongs only to a

small number of privileged men: it has been necessary even for them to subdivide themselves; for no one lawyer pretends to understand the whole. Such has been the fruit of a too superstitious respect for antiquity.

When new laws happen to oppose a principle established by former laws, the stronger this principle is, the more hateful appears the inconsistency. There results a contradiction of opinions, and the disappointed expectant accuses the legislator of tyrrany.

In Turkey, when a man in office dies, the Sultan appropriates to himself all his fortune, at the expense of his children, who fall at once from opulence to misery. This law, which overturns all the natural expectations, is probably derived from certain other eastern governments, in which it is less inconsistent and less odious, because the sovereign only confers office upon eunuchs.

4. Fourth condition — It is only possible to make laws truly consistent, by *following the principle of utility*. This is the general point of union for all expectations.

Still a law conformed to utility may be found opposed to public opinion. But this is only an accidental and transient circumstance: it is only necessary to render this conformity sensible, in order to bring back all minds. As soon as the veil which hides it is withdrawn, expectation will be satisfied, and public opinion reconciled. But the more it is certain that the laws are conformed to utility, the more manifest will that utility become. If a quality be attributed to a subject which does not possess it, the triumph of this error may not endure for a day: a single ray of light is sufficient to dissipate the illusion. But a quality which really exists, though unknown, may be happily discovered at any instant. At the first moment, an innovation is surrounded by an impure atmosphere: a collection of clouds, formed by caprice and prejudice, floats around it; its form is distorted by the refractions caused by these deceptive mediums: it requires time for the eye to fix itself, and to separate from the object every thing which is foreign to it. But, by degrees, just views will gain the ascendency. If the first efforts are not successful, the second attempts will be more fortunate; because the point of difficulty to be overcome will be better known. The plan which favours the greatest number of interests cannot fail at last to obtain the greatest number of suffrages; and the useful novelty, at first repelled with disgust, will soon become so familiar that its beginning will not be recollected.

5. Fifth condition — *Method in the laws.* An error in form in a code of law may produce, with respect to its influence upon expectation, the same inconvenience as incoherence and inconsistency. There may result from it the same difficulty of comprehension and retention. Every man has his determinate measure of understanding: the more complex the law, the greater the number of those who cannot understand it. Hence it will be less known; it will have less hold upon men; it will not occur to their minds on the occasions on which it ought, or, what is still worse, it will deceive them, and give birth to false expectations. Both the style and arrangement ought to be simple. The law should be a manual of instruction for every individual, and he ought to be able to consult it, under all his doubts, without requiring an interpreter.

The more conformable laws are to the principle of utility, the more simple will be their systematic arrangement.

A system founded upon a single principle might be as simple in its form as in its foundation. It only is susceptible of a natural arrangement and a familiar nomenclature.

6. Sixth condition — For the purpose of overcoming expectation, it is also necessary that the law should be present to the mind *as about to be executed;* or at least, no reason should be perceived to lead to a contrary presumption.

Does a man hope easily to escape from the law? He forms an expectation in a manner opposed to the law. The law is therefore useless; it only retains its force for the purpose of punishment; and these inefficacious punishments are another evil with which to reproach the law. Despicable in its weakness, hateful in its strength, it is always bad, whether it reach the guilty, or they enjoy impunity.

This principle has been often disregarded in a striking manner: for example, when, under the banking system of the projector Law, people were prohibited from retaining in their own hands more than a certain sum of money, every one presumed upon a successful disobedience to this law.

A multitude of prohibitory commercial laws are defective in this respect. This multitude of easily eluded regulations forms, so to speak, an immoral lottery, in which individuals speculate in opposition to the legislature.

This principle forms a good reason for placing the domestic authority in the hands of the husband. If it had been given to the wife, the physical power being on the one side, and the legal power on the other side, discord would have been eternal. If equality had been established between them, this nominal equality could not have been maintained, because, between two opposite wills, one or the other must necessarily turn the scale. The subsisting arrangement is therefore most favourable to the peace of families, because, by making both powers to act in

concert, every thing has been done which is necessary for its exercise.

This same principle will be very useful in assisting in the resolution of some problems which have too much embarrassed lawyers, such as this: in a certain case, ought a *thing found* to be considered the property of the finder? The more easily he can appropriate the thing independently of the law, the more desirable is it, not to make a law which shall disappoint this expectation: or, in other words, the more easy it is to elude the law, the more cruel would it be to make a law which, appearing to the mind almost incapable of execution, could not fail to produce evil when it should chance to be executed. Let us illustrate this by an example: Suppose I find a diamond in the earth: my first movement will be to say this is mine; and the expectation of keeping it will naturally be formed at the same moment, not only from the inclination of the desires, but also from analogy with the habitual ideas of property: 1*st*, I have possession of it, and this possession alone is a good title, when there is no opposite title. 2*dly*, Its discovery is due to me: it is I who have drawn this diamond from the dust, in which it was unknown to all the world, and where it was of no value. 3*dly*, I may flatter myself with keeping it without the knowledge of the law, and in opposition to the laws themselves, because it will be enough if I can hide it till I have a pretence for making it to be believed that I have acquired it by some other title. Hence, when the law would dispose of it in favour of some other person than me, it does not hinder this first movement, this hope of keeping it; and therefore, by taking it from me, it makes me experience that pain of disappointed expectation, which is commonly called *injustice* or *tyranny*. This reason would therefore be sufficient for giving a thing found to the finder, unless there be a stronger opposite reason.

This rule might therefore vary according to the chance which the thing naturally presents of its being kept without the knowledge of the laws: a vessel shipwrecked, that I have been the first to discover upon the shore — a mine — an island that I may have discovered, are objects respecting which, a previous law might prevent in me all idea of property, because it is not possible for me to appropriate them in secret. The law which refuses them to me, being of easy execution, would have its full and entire effect upon my mind. Therefore, upon consulting this principle alone, the legislator would be at liberty, either to grant or refuse the thing to the author of the discovery. But there is one particular reason in his favour: it is a reward given to industry; it tends to augment the general wealth. If all the profit of a discovery went into the public treasure, this all would be but little.

7. The seventh and last condition for regulating expectation is, that the *laws should be literally understood*. This condition depends in part upon the laws, and in part upon the judges. If the laws are not in harmony with the intelligence of the people — if the laws of a barbarous age are not changed in an age of civilization, the tribunals will depart by degrees from the ancient principles, and insensibly substitute new maxims. Hence will arise a kind of combat between the law which grows old, and the custom which is introduced, and in consequence of this uncertainty, a weakening of the power of the laws over expectation.

To interpret has signified entirely different things in the mouth of a lawyer, and in the mouth of another person: to interpret a passage of an author, is to show the meaning which he had in his mind; to interpret a law, in the sense of a Roman lawyer, is to neglect the clearly expressed intention, in order to substitute some other, by presuming that this new sense was the actual intention of the legislator.

With this manner of proceeding there is no security. When the law is difficult, obscure, incoherent, the citizen has always a chance of knowing it: it gives a blind warning, less efficacious than it might be, but always useful: the limits of the evil which may be suffered are at least perceived. But when the judge dares to arrogate to himself the power of interpreting the laws, that is to say, of substituting his will for that of the legislator, every thing is arbitrary — no one can foresee the course which his caprice may take. It is not enough to regard this evil in itself alone: how great soever it may be, this is a trifle in comparison of the weight of its consequences. The serpent, it is said, can cause its whole body to enter at the opening through which its head will pass: with regard to legal tyranny, it is against this subtle head that we should guard, for fear of shortly seeing displayed in its train all its tortuous folds. It is not only evil which should be distrusted, but good also, if derived from this source. All usurpation of a power superior to the law, though useful in its immediate effects, ought to be an object of dread for the future. There are limits, and narrow limits to the good which may result from this arbitrary power: there are none to the evil, there are none to the alarm, which may arise from it; the danger indistinctly lowers over every head.

Without speaking of ignorance and caprice, what facilities for prevarication! The judge, sometimes by conforming to the law, sometimes by becoming its interpreter, may always give right or wrong to whom he pleases: he

is always sure to save himself, either by the literal, or by the interpretative sense. He is a conjuror, who, to the great astonishment of the spectators, draws from the same fountain bitter waters, or sweet, as he pleases.

This is one of the noblest characteristics of the English tribunals: they have generally followed the declared will of the legislator with scrupulous fidelity, or have directed themselves as far as possible by previous judgments, with regard to that still imperfect portion of legislation which depends on *custom*. This rigid observation of the laws may have had some inconveniences in an incomplete system, but it is the true spirit of liberty which inspires the English with so much horror for what is called an *ex post facto* law.

All the conditions which constitute the excellence of the laws, have so close a connexion, that the accomplishment of one alone supposes the accomplishment of the others: intrinsic utility, manifest utility, connexion, simplicity, cognoscibility, probability of execution — all these qualities may be considered as reciprocally cause and effect, the one of the others.

If the obscure system called *custom* were no longer suffered to exist, and the whole law were reduced to writing — if the laws which concern every individual were collected in one volume, and those which concerned certain classes were in separate collections — if the general code were universally circulated — if it were made, as among the Jews, a portion of the religious service, one of the manuals of education — if it were required to be engraven upon the memory before admission to the exercise of political privileges — the laws would then become truly known; every deviation from them would be sensible, every citizen would be their guardian; there would be no mystery to conceal them — no monopoly in their explanation — no fraud or chicane to elude them.

It is also necessary that the style of the laws should be as simple as their arrangement; that the language in ordinary use should be employed; that their formulas should have no scientific apparatus; and, in a word, that if the style of the book of the laws were distinguished from the style of other books, it should be by its superior perspicuity — by its greater precision — by its greater familiarity, because it is intended to be understood by all, and particularly by those least enlightened.

When one has formed a conception of this system of laws, and comes to compare it with those that exist, the feeling which results is far from being favourable to our existing institutions.

We must, however, distrust grievous declamations and exaggerated complaints, though the laws may be imperfect. He who should be so confined in his views, or so unreasonable in his ideas of reform, as to seek to inspire revolt or contempt against the general system of the laws, would be unworthy of attention at the tribunal of an enlightened public, who can enumerate their benefits — I do not say under the best, but under the worst of governments. Do we not owe to them all that we possess of security, property, trade, abundance? Do they not preserve peace among our fellow-citizens, the sanctity of marriage, and the gentle perpetuity of families? The good which they produce is universal — it is enjoyed every day and every moment: the evils which result from them are transitory. But the good does not make itself felt; it is enjoyed without being referred to its source, as if it were in the ordinary course of nature; whilst the evils are vividly perceived, and in describing them, there is accumulated into one moment, and upon one point, sufferings which are dispersed over a large space, and a long tract of time. There are abundant reasons for loving the laws, notwithstanding their imperfections.

Innovations in the laws should be made with great caution. It is not well to destroy everything, upon pretence of reconstructing the whole: the fabric of the laws may be easily dilapidated, but is difficult to be repaired, and its alteration ought not to be entrusted to rash and ignorant operators.

PART II.

CHAPTER I.

OF TITLES WHICH CONFER A RIGHT TO PROPERTY.*

THUS far we have shown the reasons which should lead the legislator to sanction the existence of property. But we have only considered wealth in the mass: it is, however, necessary to descend to details; to take the individual objects which compose it, and seek out the principles which ought to govern the distribution of property at the periods when it presents itself to the law for appropriation to such or such an individual. These principles are the same that we have already laid down: *Subsistence*, *abundance*, *equality*, *security*. When they accord, the

* See this word *Title*, in the Essay entitled "A general view of a body of law." This subject is only glanced at here.

decision is easy: when they separate, it is necessary to learn to distinguish which ought to be preferred.

1. *Actual Possession.*

Actual possession is a title to property, which may precede and supply the place of all others: it will be always good against every man who has no other title to oppose to it. Arbitrarily to take away from him who possesses, in order to give to him who possesses not, would be to create a loss upon one side and a gain upon the other. But the amount of the pleasure would not be equal to the amount of the pain. First reason: — One such act of violence would spread alarm among all proprietors, by attacking their security. Second reason: — Actual possession, therefore, is a title founded upon the good of the first order and the good of the second order.

What is called the right of the *first occupant*, or the *original discoverer*, amounts to the same thing. When the right of property is granted to the first occupant — 1*st*, He is spared the pain of disappointment; that pain which he would feel at finding himself deprived of the thing which he had occupied before all others. 2*dly*, It prevents contests; the combats which might take place between him and successive competitors. 3*dly*, It gives birth to enjoyments which, without it, would not exist for any one: the first occupier, trembling lest he should lose what he had found, would not dare openly to enjoy it, for fear of betraying himself; hence, all that he could not immediately consume would be of no value to him. 4*thly*, The good that is secured to him, acting in the character of reward, becomes a spur to the industry of others, who are led to seek to procure for themselves similar advantages; and the increase of the general wealth is the result of these individual acquisitions. 5*thly*, If every unappropriated thing did not belong to the first occupier, it would always be the prey of the strongest: the weak would be subject to continual oppression.

All these reasons do not present themselves distinctly to the minds of men: but they perceive them confusedly, and feel them as by instinct. Hence they say reason, equity, justice, direct it. These words, repeated by every body, without being explained by any one, express only a sentiment of approbation; but this approbation, founded upon solid reasons, can but acquire new force from the support of the principle of utility.

The title of original occupation has been the primitive foundation of property. It may be employed again, with regard to newly-formed islands, or lands newly discovered, reservation being made of the right of governing — the superior right of the sovereign.

2. *Ancient* bonâ fide *Possession.*

Possession of a certain standing, fixed by the law, ought to be superior to all other titles. If you have allowed so long a time to elapse without claiming your right, it is a proof that you have not known of its existence, or that you did not intend to make use of it. In these two cases, there has not been any attempt on your part — any desire to obtain possession of the thing; but on mine there has been the attempt and the desire to preserve it. To leave me in possession, is not to oppose security: to transfer it to you, is to attack it, and is to make all possessors uneasy, who know of no other title to their property than ancient *bonâ fide* possession.

But what time should be requisite to produce this displacement of hope? or, in other words, what time is requisite to legalize property in the hands of its possessors, and to extinguish all opposing titles? Nothing can be precisely determined: the lines of demarcation must be drawn at hazard, according to the value of the goods to which they refer. If this line of demarcation does not always prevent *disappointment* among those interested, it will prevent at least all evils of the second order. The law warns me, that if, during one year, ten years, or thirty years, I neglect to claim my right, the loss of this right itself will be the result of my negligence. This threat, the effects of which I can prevent, does not injure my security.

I have supposed that the possession is honestly obtained: in the contrary case, to confirm it would be, not to favour security, but to reward crime. The age of Nestor ought not to be sufficient to secure to an usurper the wages and the price of his iniquity. For why should there be a period when the malefactor should become tranquil? why should he enjoy the fruits of his crimes under the protection of the laws which he has violated?

With respect to his heirs, it is necessary to make distinctions. Are they honest? There may be alleged in their favour the same reason as for the ancient proprietor, and they have possession, besides, to incline the balance in their favour. Are they dishonest, as their predecessors were? They are his accomplices, and impunity ought never to be the privilege of fraud.

Second Title — *Ancient bonâ fide Possession, notwithstanding opposite title.*

This is what is commonly called *prescription.* — Reasons upon which it is founded: Prevention of disappointment — General security of proprietors.

3. *Possession of the* Contents, *and of the* Produce *of Land.*

Property in land includes all that this land

contains, and all that it *produces*. Can its value be any thing but its contents and its produce? By its contents, are understood every thing which is below the surface, as mines and quarries; by its produce, every thing which belongs to the vegetable kingdom. All possible reasons unite for the giving this extent to the right of property in land — security, subsistence, the increase of the general wealth, the blessing of peace.

4. *Possession of what the Land* nourishes, *and of what* it receives.

If my land nourish animals, it is to me they owe their birth and their nourishment; their existence would have been a loss to me, if the possession of them did not secure me an indemnity. If the law give them to any one but me, there will be all the loss on one side, and all the gain on another — an arrangement opposed as well to equality as to security. It would then be my interest to diminish their number, and to prevent their increase, to the detriment of the general wealth.

If chance have thrown upon the earth things which have not yet received the seal of property, or which have lost the impression; as a whale cast on shore by a tempest, the scattered remains of a shipwreck, or uprooted trees; these things ought to belong to the possessor of the land. The reason of this preference: — He is so situated as to derive a profit from them, without loss to any individual: they cannot be refused to him, without occasioning a pain of disappointment; and indeed no one can take possession of them without occupying his land, or without encroaching upon his rights. He has in his favour all the reasons of the first occupant.

5. *Possession of neighbouring Lands.*

The waters which have covered unappropriated lands leave them: — To whom shall the property in these new lands be granted? There are many reasons for giving them to the proprietors of the neighbouring lands: 1*st*, They only can occupy them without encroaching upon the property of others. 2*d*, They only can have formed any hope respecting these lands, and previously considered them as belonging to themselves. 3*d*, The chance of gaining by the retreat of the waters is only an indemnity for the chance of losing by their invasion. 4*th*, The property in lands acquired from the waters will operate as a reward exciting to the labours necessary for this kind of conquest.*

6. *Amelioration of one's own things.*

If I apply my labour to one of those things which are already considered as belonging to me, my title acquires new force. These vegetables which my land produces — I have sown and gathered them. I have tended these cattle, I have dug up these roots, I have felled these trees, and I have hewn them. If I should have suffered on having these things taken from me in a rough state, how much more shall I not suffer now, since each effort of my industry has given to these objects a new value, has strengthened my attachment to them, and the wish I have to keep them? These sources of future enjoyments, continually augmented by labour, would not exist without security.

7. *Mutual Possession and bonâ fide Amelioration.*

But if I apply my labour to a thing which belongs to another, treating it as if it were my own; for example, if I have made cloth with your wool; to which of us ought the thing produced to belong? Before answering this question, the question of fact must be cleared up: Was it honestly or dishonestly that I treated the thing as my property? If I have acted dishonestly, to leave me possessed of the thing produced, would be to reward the crime: if I have acted honestly, it remains to be examined, which of the two values is the greater — the original value of the thing, or the value added to it by the labour? How long has the first possessor lost it? how long have I possessed it? To whom does the place belong, in which it is found situated, at the moment it is reclaimed — to me, to the ancient possessor, or to another?

The principle of caprice having no regard to the measure of pains and pleasures, gives all to one of the parties, without caring for the other. The principle of utility, desirous of reducing to the lowest term, an inevitable inconvenience, weighs the two interests, seeks a method of reconciling them, and prescribes indemnities. It awards the article to that one of the two claimants, who would lose the most if his claim were rejected, but subject to the charge of giving to the other a sufficient indemnity.

It is after these same principles, that the same question ought to be resolved, with regard to an article which has been mixed and confounded with another; as metal belonging

* Thus much for the theory: as to execution, it would require many details, otherwise this conversion would resemble the division of the new world which the Pope made between the Spaniards and Portuguese. The waters quit a bay: there are many proprietors upon its borders. Shall the distribution be regulated by the quantity of land belonging to each proprietor, or by the extent which he occupies along its sides? Lines of demarcation are necessary; but it is not necessary to wait to trace these lines till the event happens, and the value of the derelict lands is known; for all will then entertain hopes which can be realized only by some individuals. Before this period, expectation not being yet formed, easily follows the finger of the legislator.

to you, which has been mingled in the crucible with metal belonging to me; liquor belonging to me, which has been poured into the same vessel with liquor belonging to you. There have been grand debates among the Roman lawyers, to determine to whom to give the whole. The one party, under the name of *Sabinians*, would give the whole to me; the other party, under the name of *Proculians*, would give all to you. Which was right? Neither of them: their decision always left one suffering party. One simple question would have prevented all these debates: Which of the two, by losing what had been his, would lose most?

The English lawyers have cut the gordian knot. They have not taken the trouble to examine where would be the greatest injury: they have neither considered honesty nor dishonesty, nor the greatest real value, nor the greatest desire to keep. They have decided that moveable property shall always be awarded to the possessor at the time, subject to the charge of indemnifying the original proprietor.

8. *Exploring of Mines in the Lands of another.*

Your land incloses in its bosom treasures; but, either from want of knowledge, or want of means, or want of confidence in your success, you will not seek for them, and the treasures remain hidden. If I, a stranger to your property, have all that you want for their exploring, and I ask to do it, ought the right to do so to be awarded to me without your consent? Why not? Under your land, the buried wealth does good to no one: in mine it will acquire great value; thrown into circulation, it will animate industry. What injury is done to you? You lose nothing: the surface, the only thing from which you derive any thing, remains always in the same state. But what the law, attentive to your interests, ought to do for you, is to award you a greater or less considerable part of the product; for though this treasure was nothing in your hands, it left you a certain expectation of profiting by it some day, and this chance ought not to be taken from you without indemnity.

Such is the law of England. In certain districts, it permits, upon certain conditions, the pursuit of a vein of metal discovered in the field of another, to whosoever wishes to try the adventure.

9. *Liberty of Fishing in Great Waters.*

Great lakes, great rivers, great bays, and especially the ocean, are not occupied as exclusive property. They are considered as belonging to no person, or, to speak more correctly as belonging to all.

There is no reason for limiting the right of fishing in the ocean. The multiplication of most kinds of fishes appears inexhaustible. The prodigality, the munificence of nature in this respect, surpasses every thing which can be conceived. The indefatigable Lewenhoek has estimated the number of eggs in the roe of a single cod at above six millions. What we can take and consume in this immense magazine of food is absolutely nothing, compared with the destruction produced by physical causes, which we neither know, nor can prevent, nor weaken. Man in the open sea, with his nets and lines, is only a feeble rival to the great tyrants of the ocean; whilst as to the fishes of rivers, lakes, and little gulfs, the laws take efficacious and necessary precautions for their preservation.

There is no reason for jealousy, no danger of diminishing the sources of wealth, by the number of competitors: the right of the first occupant may be left for each, and every species of labour encouraged, which tends to increase the general abundance.

10. *Liberty of Hunting upon Unappropriated Lands.*

It is the same with uncultivated and unappropriated lands, wild forests. In those vast countries which are not peopled in proportion to their extent, these tracts form considerable spaces, in which the right of hunting may be exercised without restraint. Man is there as yet only the rival of the carnivorous animals, and the chase extends the sources of subsistence without injury to any one.

But in civilized societies, in which agriculture has made great progress, where the unappropriated lands bear only a small proportion to those which have received the seal of property, there are many reasons which plead against the right of chase granted to the first occupier.

First Inconvenience. — In those countries where the population is numerous, the destruction of wild animals may proceed faster than their reproduction. Render the chase free, the kinds of animals which are its objects may be sensibly diminished, and even annihilated. The sportsman would then have as much trouble to procure a single partridge, as he has now to procure a hundred; and this would make them a hundred-fold dearer. He would not himself lose, but he would only furnish to society one hundredth part of the value he now furnishes. In other and more simple terms, the pleasure of eating partridges would be reduced to a hundredth part of what it is.

Second Inconvenience. — The chase, without being more productive than other labours, has unhappily more attractions: play is there combined with labour, idleness with exercise, glory with danger. The charm of a profes-

sion, so well suited to all the natural tastes of man, draws into this career a great number of competitors: by their rivalry they reduce the price of the labour employed upon it to the most simple subsistence; and in general this class of adventurers will be poor.

Third Inconvenience.—The chase having particular seasons, there will be intervals in which the activity of the hunter will be chained up. He will not easily return from a wandering to a sedentary life—from independence to subjection—and from a habit of idleness to a habit of labour. Accustomed, like the gamester, to live upon chances and hopes, a small fixed salary will have few attractions for him. His is a state which leads a man to crime, from its misery and idleness.

Fourth Inconvenience.—The exercise even of this profession is naturally fruitful in crimes. The multitude of quarrels, of lawsuits, prosecutions, convictions, imprisonments, and other punishments to which it gives rise, are more than sufficient to counterbalance its pleasures. The hunter, tired of vainly waiting for his prey in the high-roads, spies out in secret the game of the neighbouring proprietors. Does he think himself observed? he turns aside, he hides himself, he uses patience and cunning. Does he think there are no witnesses? he no longer respects any bounds; he passes the ditches, he leaps the hedges, he lays waste the inclosures, and his cupidity, betraying his prudence, throws him into situations from which he often cannot escape without misfortune or crime.

If the right of chase were permitted on the high-roads, an army of guards would be requisite to prevent the wanderings of the hunters.

Fifth Inconvenience.—If this right of chase be allowed to exist, though so little advantageous when exercised in such narrow limits, an assortment of laws is requisite in the civil and penal code, to determine its exercise and to punish its violations. This multiplication of laws is an evil, because they cannot be multiplied without being weakened. Besides, the severity necessary to prevent such easy and attractive crimes, gives an odious character to property, and places the rich man in a state of war with his indigent neighbours. The means of cutting short this inconvenience is not to regulate, but to suppress this right.

The prohibitory law once known, no expectation will be formed of enjoying this privilege: partridges will be no more coveted than fowls, and in the minds of the multitude, poaching will not be distinguished from theft.

It is true, that at present popular ideas are in favour of this right of chase; but if it be sometimes necessary to yield to popular ideas, it is only upon those occasions in which they have great strength, and in which there is no hope of changing their course. When pains shall be taken to enlighten the people, to discuss the motives of the law, to make them consider it as a means of peace and security, by showing that the exercise of this right is reduced almost to nothing—that the life of a hunter is miserable—that this ungrateful profession incessantly exposes him to criminality, and his family to indigence and shame, I dare affirm that popular opinion, pressed by the continual and gentle force of reason, will in a short time take a new direction.

There are some animals whose value after death does not compensate for the damages they do: such are foxes, wolves, bears, all carnivorous beasts, the enemies of the species subjected to man. Far from preserving them, it is only desirable that they should be destroyed. One method is to give the property in them to the first occupant, without regard to the territorial proprietor. Every hunter who attacks hurtful animals ought to be considered as employed by the police. But this exception should only be admitted with regard to animals capable of causing great waste.

CHAPTER II.

ANOTHER MODE OF ACQUISITION—CONSENT.

IT may, however, happen, that after any thing has been possessed (by a legal title), the individuals may wish to give it up, by abandoning its enjoyment to another. Shall this arrangement be confirmed by the law? Without doubt it ought to be: all the reasons which plead in favour of the ancient proprietor are no longer on his side, but plead in favour of the new. Besides, the former proprietor must have had some motive for abandoning his property. He who speaks of a *motive*, speaks of a *pleasure* or its equivalent: *pleasure of friendship*, or of *benevolence*, if the thing be given for nothing; *pleasure of acquisition*, if it be made an object of exchange; benefit of *security*, if it have been given to save him from some evil; *pleasure of reputation*, if he propose by it to acquire the esteem of his fellows. The sum of enjoyment, as to these two interested parties, is necessarily augmented by the transaction. The acquirer puts himself in the place of the collater as to the ancient advantages, and the collater acquires a new advantage. We may therefore establish it as a general maxim, that *every alienation implies advantage*. Some good always results from it.

* See the chapter *Of Collative and Ablative Events with regard to Property*. The explanation of the word Title will be found there. I have here avoided reference to questions of method and nomenclature.

If there be an exchange, there are two alienations, each of which has its separate advantages. This advantage for each of the contracting parties is the difference between the value which they put upon what they give up, and the value of what they acquire. In each transaction of this kind, there are two new masses of enjoyment. In this consists the advantage of commerce.

We may observe, that in all the arts there are many things which can only be produced by the concurrence of a great number of workmen. In all these cases, the labour of one would possess no value, either for himself or others, if he could not exchange it.

2. *Causes of Invalidity in Exchanges.*

There are some cases in which the law ought not to sanction exchanges, and in which the interests of the parties ought to be regulated as if the bargain did not exist; because, instead of being advantageous, the exchange would be found hurtful either to one of the parties or to the public. All the causes which invalidate exchanges, may be ranged under the nine following heads: —

1. Undue concealment.
2. Fraud.
3. Undue coercion.
4. Subornation.
5. Erroneous supposition of legal obligation.
6. Erroneous supposition of value.
7. Interdiction—Infancy—Madness.
8. Things liable to become hurtful by the exchange.
9. Want of right on the part of the collator.

1. *Undue Concealment.*—If the object acquired be found to be of an inferior value to that which has served as the motive for its acquisition, the new proprietor experiences regret, and feels the pain of disappointment. If this value be below that which he has given in exchange, instead of a gain, he has made a loss. It is true that the other party has made a profit, but the pleasure of gaining is not equal to the evil of losing. I have paid ten pounds for a horse, which is worth them, if he were sound; but since he is pursy, he is not worth two: the seller has gained eight pounds, and I have lost the same sum. When the interests of these two parties are weighed together, the bargain is not advantageous, but contrariwise.

However, if at the time of the bargain, this degradation in value was not known to the former proprietor, why should the bargain be void? — why should he be constrained to make a disadvantageous exchange? The loss must fall upon some one: why should it be made to fall upon him, rather than the other?

Suppose even that he knew of this circumstance which depreciated the value of the article: was it his place to make it known, rather than that of the buyer to inquire respecting it?

These two questions ought always to be asked in connexion with invalidity, resulting from *undue concealment:* — Did the seller know of the existence of the defect? Was the case one of those in which he was obliged to reveal it? The solution of these questions requires too many details and researches to have place here; besides, it is not possible to frame an answer which would embrace all cases, and different modifications would be requisite, according to the different kinds of things.

2. *Fraud.* — This case is more simple than the preceding. A fraudulent acquisition ought never to be permitted, if it can be hindered: it is an offence which approaches to theft. You have asked of the seller if the horse be pursy; he has replied in the negative, knowing the contrary. To sanction the bargain, would be to reward a crime. The reason given in the preceding case may be added, namely, the evil for the buyer is greater than that for the seller, and it is clear that this cause of invalidity is well founded.

3. It is the same with *undue Coercion.* — The seller, whose horse is only worth two pounds, constrains you by violence and threats to buy it for ten pounds: suppose that you would have been willing to pay him two pounds, the surplus is so much gained by a crime. It is true, that this loss was an advantage to you in comparison with the evil with which you were threatened in case of refusal; but neither this comparative advantage, nor that of the delinquent, ought to counterbalance the evil of the crime.

4. It is the same *with Subornation.* — I understand, by subornation, the price of a service which consists in the commission of a crime; as money offered to engage a man to take a false oath. There are two advantages in the bargain — that of the suborned, and that of the suborner; but these two advantages are nothing equal to the evil of the crime.

I remark in passing, that in cases of fraud, undue coercion, and subornation, the law should not content itself with annulling the act: it ought to oppose a stronger counterpoise by means of punishments.

5. *Erroneous Supposition of Legal Obligation.* — You have delivered your horse to a man, believing that your steward had sold him; and this had not happened: you have delivered your horse to a man, believing that he was authorized by the government to make you give him up for the service of the state; but he had no such commission: in a word, you have believed yourself under a

legal obligation to sell, and this obligation did not exist. If the alienation should be confirmed after the error is discovered, the buyer would find that he had made an unexpected gain, the seller an unexpected loss. But we have seen that the *advantage of gaining*, cannot be compared with the *evil of losing*; besides, this case may be referred back to the head of undue cœrcion.

6. *Erroneous Supposition of Value.*— If, in alienating any thing, I am ignorant of a circumstance which tends to increase its value, when I discover my error, I experience regret for the loss. But is this a proper cause of invalidity? On the one hand, if such causes of nullity are admitted without restriction, there is great risk of throwing discouragement upon exchanges; for where is the security for my acquisitions, if the former proprietor could break the bargain by saying, "I did not understand what I did?" On the other hand, there would be a lively pain of regret, if, after having sold a diamond as a piece of crystal, there were no method of recovering it. To maintain an even balance between the parties, the diversity of circumstances and things must be regarded. It is necessary always to examine whether the ignorance of the seller were not the result of negligence; and even in cancelling the bargain, if the case demand it, it is proper, before every thing else, to provide for the security of the buyer interested in its confirmation.

However, it may happen, that a bargain free from all these defects may at last be found disadvantageous. You have bought this horse only for one journey; and the journey is not made. You were ready to set out; the horse fell ill and died. You set out; the horse throws you, and you break your leg. You mount the horse; but it is that you may go to rob upon the highway. The fancy which led you to purchase it being passed, you resell it at a loss. Cases might be multiplied to infinity, where a thing, whatever it may be, acquired on account of its value, may become useless, or burthensome, or dangerous, either to its acquirer, or to another. Are not these exceptions to the axiom, that every alienation implies advantage? — are not these as reasonable grounds of invalidity as the others?

No: all these unfavourable events are only accidents, and subsequent to the conclusion of the bargain: the ordinary case is, that the article is worth what it sells for. The total advantage of advantageous exchanges is more than equivalent to the total disadvantage of unfavourable bargains. The gains of commerce are greater than its losses, since the world is richer at present than in its savage state. Alienations ought, therefore, in general, to be maintained. But to annul alienations for accidental losses, would be to interdict alienations in general; for no person would buy — no person would sell — if the bargain might at any moment be made void in consequence of some subsequent event, which could neither be foreseen nor prevented.

7. There are some cases in which, foreseeing the evil of contracts, the legislature has prohibited them beforehand. Thus, in many countries, prodigals are interdicted; that is to say, all bargains made with them are declared invalid. But they begin by stating the danger, that is to say, the disposition which renders the prodigal unable to guide his affairs: every body is, or at least may be, informed of the imbecility with which he is struck, by the tutelary hand of justice.

Interdiction exists every where with regard to the two analogous cases of infancy and mental imbecility. I say analogous; for what an infant is for a time, which can be tolerably well determined, though by a demarcation always more or less arbitrary, a madman is for an indeterminate time, or for ever. The reasons are the same as in the preceding case. Minors and madmen are, by their condition, either ignorant, rash, or prodigal. They are presumed to be so, by a general indication, which does not require to be supported by particular proofs.

It will be easily seen, that in these three cases, the interdiction can only extend to things of a certain importance: to apply it to the trifling objects of daily consumption, would be to condemn these three classes to die by hunger.

8. The law also renders bargains invalid, on account of some probable inconvenience which may result from them.

I have an estate situated upon the confines of the state: acquired by a neighbouring power, it might become the focus of certain hostile intrigues, or favour dangerous preparations against my country: whether I think of this effect or not, the law ought to think of it for the public; it ought to prevent the evil, by refusing beforehand the guarantee of its seal to such bargains.*

The restraints which it has been thought necessary to put upon the sale of drugs capable of being employed as poisons, belong to this same head. It is the same with the prohibition of the sale of murderous weapons,

* The greater number of states, without perhaps thinking of it, have obviated this danger by a general law which interdicts the acquisition of landed property by strangers. But they have gone too far. The reason of this prohibition does not extend beyond the particular case which I have mentioned. The foreigner who wishes to buy an immoveable in my country, gives the least equivocal proof of his affection for it, and the most certain pledge of his good conduct. The state can only gain in this case, even under the simple head of finance.

such as stilettoes, of which such frequent use is made in Italy, in the most ordinary quarrels.

It is to the same motive, well or ill founded, that all prohibitions relative to the introduction or sale of certain kinds of merchandise must be referred.

In the greater number of cases, the custom is to say, that the *bargain is null in itself.* It is only to open the books of law to see how much nonsense has been written upon this erroneous notion, and into how much embarrassment lawyers have fallen, from not having seized the only cause of nullity, as respects bargains made under these circumstances, which is, that more evil than good results from them.

After saying that these conventions are null in themselves, to be consistent, it is necessary to conclude, that they ought not to have any effect — that they ought to be destroyed—that no trace should be left of them. In many cases, however, it is enough to modify them, to correct their inequalities by compensations, without altering the foundation of the primitive contract.

No bargain is void in itself—no bargain is valid of itself: it is the law which in each case gives or refuses validity. But for permitting or refusing, there ought to be reasons. Equivocal generation is banished from sound philosophy: some day, perhaps, it will be banished from jurisprudence. This *null in itself* is precisely an equivocal generation.

3. *Of Obstacles to the Alienation of Land.*

To say that the power of alienation is useful, is as much as to say that the arrangements which tend to destroy it are in general pernicious.

It is only with regard to immoveables that this inconsistency has been exercised, both by entails and unalienable foundations; and yet, besides the general reasons in favour of the power of alienation, there are particular reasons in favour of the power of alienating lands.

1. He who seeks to get rid of his lands, shows plainly that it does not suit him to keep them: he cannot or he will not employ any thing in improving them; often, indeed, he cannot restrain himself from lowering their future value, in order to satisfy a present want. On the contrary, he who seeks to acquire them has certainly not the intention of deteriorating them; and it is probable that he purposes to increase their value.

It is true, that the same capital which would be employed in the amelioration of land might be employed in trade; but though the benefit of these two employments might be the same for the individuals, it is not the same for the state. The portion of wealth applied to agriculture is more fixed;—that which is applied to trade is more fugitive. The first is immoveable; the second may be carried away at the will of the proprietor.

2. By pledging an immoveable, a productive capital may be procured: thus one part of the value of an estate may be employed in ameliorating another, which, without this resource, could not be done. To hinder the alienation of lands is, therefore, to diminish productive capital nearly to the amount of their selling value; since, in order that an article may serve as a pledge, it is necessary that it be capable of alienation.

It is true, that a loan only has been here contemplated: there is no new capital created by the transaction. This same capital might have received a destination not less useful in the hands in which it was first found; but it ought to be observed, that the greater the means of employing capital, the more it will flow towards the country: that which is derived from abroad, forms a clear addition to that which is derived from home.

These restraints upon alienation, though condemned by the soundest notions of political economy, subsist almost every where. It is true that they have gradually diminished, as governments have better understood the interests of agriculture and trade; but there are still three causes which operate for their maintenance:—

The first is the desire of preventing prodigality. But it is not necessary, for obviating this evil, to hinder the sale of lands: it is sufficient to protect their value by not leaving it at the disposal of the individual. In a word, the specific method against this inconvenience is interdiction.

The second is pride of family, connected with the agreeable illusion, which represents the successive existence of our descendants as a prolongation of our own. To leave them the same amount of wealth is not enough to satisfy the imagination: we wish to secure them the same lands, the same houses, the same natural objects. This continuity of possession appears as a continuity of enjoyment, and presents a point of support to a fanciful feeling.

The third cause is the love of power—the desire of governing after death. The preceding motive supposes posterity: this does not suppose it. It is to this cause must be referred, as well those foundations which have in view an object of utility, well or ill understood, as those which repose only upon fancies.

If the foundation consist only in the distribution of benefits, without imposing any condition—without exacting any service, it seems sufficiently innocent, and its continuance is not an evil. It is proper to except foundations for the distribution of alms, applied without discernment, and adapted only

to the encouragement of mendicity and idleness. The best of these establishments are those of charity for the poor of a rank already a little elevated — a means which offers to these unfortunate persons a more liberal relief than the general rule would allow; whilst, as to the benefices which are only granted upon the discharge of certain duties, as in colleges, convents, churches, their tendency is useful, indifferent, or hurtful, according to the nature of the duties required.

One singularity which deserves to be observed is, that in general these foundations, these particular laws that individuals have established by the indulgence of the sovereign, have experienced more respect than the public laws which originate directly with the sovereign. When a legislator has desired to tie the hands of his successor, this pretension has appeared either inconsistent or futile. The most obscure individuals have arrogated this privilege, and none have dared to disappoint them.

It would seem, that lands left to corporations, to convents, churches, would be liable to be deteriorated. Indifferent as to his successors, each passing proprietor would seek to squeeze as much as possible out of the transitory possession, and neglect the care of them, especially in old age. This may sometimes have happened: justice ought, however, to be rendered to the religious communities. They have more often been distinguished for a good, than a bad economy. If their situation inflame their cupidity and avarice, it also represses pomp and prodigality: if there be causes which excite their selfishness, there are others which combat it, by what is called *esprit de corps*.

There is no necessity for expatiating with regard to public property; that is, with regard to things used by the public, such as roads, churches, markets. To fulfil their design, they ought to possess an indefinite duration, with the exception of their admitting those successive changes which circumstances may require.

CHAPTER III.

ANOTHER MEANS OF ACQUISITION — SUCCESSION.

AFTER the death of an individual, how ought his property to be disposed of?

The legistature should have three objects in view: — 1*st*, To provide for the subsistence of the rising generation; 2*dly*, To prevent the pain of disappointment; 3*dly*, To promote the equalization of fortunes.

Man is not a solitary being. With few exceptions, every man is surrounded by a larger or smaller circle of companions, united to him by the ties of relationship, marriage, friendship, or services — who *in fact* share with him the enjoyment of the property which by right belongs exclusively to him. His fortune is commonly, with regard to many of them, the sole source of their subsistence. To prevent the calamities of which they would become the victims, if death, which deprives them of their friend, should also deprive them of the succour which they derive from his fortune, would require a knowledge of what they habitually enjoy, and in what proportion they participate in it. But as these are facts which it would be impossible to establish but by direct proofs — without entering upon embarrassing procedures and infinite disputes, it has been found necessary to refer to general presumptions, as the only base upon which a decision can be established. The habitual part of each survivor, in the possessions of the deceased, may be presumed from the degree of affection which ought to subsist between them; and this degree of affection may be presumed from the proximity of relationship.

If this proximity were the sole consideration, the law of successions would be very simple. In the *first degree*, with respect to you, are all those who are connected with you, without any intermediate person — your wife, your husband, your father, your mother, and your children. In the *second degree*, all those whose connexion with you requires the intervention of a single person, or a single couple of intermediate persons — your grandfathers and grandmothers, your brothers or sisters, and your grandchildren. In the *third degree* come those whose connexion supposes two intermediate generations — your great-grandfathers, your great-grandmothers, your great-grandchildren, your uncles and aunts, nephews and nieces.

But though this arrangement may possess every possible perfection on the side of simplicity and regularity, it would not well answer the political and moral object. It does not answer better to the degree of affection of which it might be thought to furnish a presumptive proof; and would not accomplish the principal object, which is to provide for the wants of the rising generations. Let us therefore leave this genealogical arrangement for the adoption of one founded upon utility. It consists in *constantly giving to the descending line, however long, the preference to the ascending or collateral line* — in giving the preference infinitely to the descendants of each parent, over all those who cannot be reached without taking another step in the ascending line.

It will happen, however, that the presumptions of affection or of necessity, which serve as the foundation of these rules, will often be defective in practice; and that consequently the rules themselvse will diverge from their

object. But the power of making a will, as we shall see, offers an efficacious remedy to the imperfection of the general law; and this is the principal reason for preserving it.

Thus much for general principles. But how can they be applied in detail, when it is necessary to decide among a crowd of competitors?

The model of a law upon this subject, will supply the place of a multitude of discussions:

ARTICLE I. *Let there be no distinction between the sexes. Let what is said with regard to the one, be understood with regard to the other. The portion of the one shall always be equal to the portion of the other.*

REASON — *Good of equality.* If there be any difference, it ought to be in favour of the weakest — in favour of the females, who have more wants, fewer means of acquisition, and are less able to make use of the means they have. But the strongest have had all the preference. Why? Because the strongest have made the laws.

ARTICLE II. *After the death of the husband, the widow shall keep a moiety of the common property, unless otherwise provided for by the marriage-contract.*

ARTICLE III. *The other moiety shall be distributed in equal portions among the children.*

REASONS: 1. Equality of affection on the part of the father. 2. Equality of co-occupation on the part of the children. 3. Equality of wants. 4. Equality of all imaginable reasons on the one side and on the other.

Differences of age, temperament, talent, strength, &c. may produce some difference with respect to wants in point of fact; but it is not possible for the law to appreciate them: it is for the father to provide for them by means of his right of making a will.

ARTICLE IV. *If a child die before its father, leaving children, his portion shall be distributed among them in equal portions; and so on for all their descendants to infinity.*

Remarks. — The distribution by roots, instead of by branches, is preferred for two reasons:—1. In order to prevent *the pain of disappointment.* That the portion of the elder should be diminished by the birth of each younger child, is a natural event, by which expectation ought to regulate itself. However, in general, when one of the children begins to exercise its reproductive power, that of the father is generally nearly exhausted. At this period, the children ought to believe themselves arrived at the boundary of the diminutions that their respective portions ought to experience. But if each little grandson or little granddaughter produce a diminution equal to that produced by a son or daughter, the diminution would have no limits; there would be no certain grounds upon which to form a plan of life. 2. Grandchildren have for their immediate resource the property of their deceased father. Their custom of co-occupation detached from their grandfather has been exercised by preference, if not exclusively, upon the funds of paternal industry. It may be added, that they have, in the goods of their mother and of her parents, a resource in which the other children of their grandfather have no share.

ARTICLE V. *If there be no descendants, the property shall go in common to the father and mother.*

Remarks. — Why to the descendants before others?—1. *Superiority of affection.* Every other arrangement would be contrary to the paternal feelings. We love those better who depend upon us, than those upon whom we depend. It is more pleasant to govern than to obey. 2. *Superiority of wants.* It is certain that our children could not exist without us, or some one who should take our place. It is probable that our parents might exist without us, because they have existed before us.

Why should the succession pass to the father and mother, rather than to the brothers and sisters?—1. The relationship being more immediate, a superior affection is presumed. 2. It is a recompense for services rendered, or rather an indemnity for the pains and expenses of education. What forms the relationship between my brother and myself? Our common relation to the same father and the same mother. What renders him more dear to me than any other companion with whom I have passed an equal portion of my life? It is because he is more dear to those who have my first affections. It is not certain that I am indebted to him for any thing, but it is certain that I owe every thing to them. Hence, upon all occasions in which the stronger titles of my children do not intervene, I owe them those indemnities to which a brother cannot pretend.

ARTICLE VI. *If either of the two be dead, the portion of the deceased shall go to his descendants, in the same manner as it would have gone to the proprietor's own relations.*

Remarks. — In poor families which only possess household furniture, it is more desirable that the whole should pass to the surviving father or mother, with the charge of providing for the support of the children. The expenses of the sale, and the dispersion of the property, would ruin the survivor, whilst the portions, too small to serve as a capital, would soon be dissipated.

ARTICLE VII. *In default of such descendants, the property shall go entirely to the survivor.*

ARTICLE VIII. *If both be dead, the property shall be divided, as before directed, among their descendants.*

ARTICLE IX. *But in such manner, that the*

portion of the half blood shall only be the half of the portion of the whole blood, when there is any such.

Reason—*Superiority of affection.* Of the two bonds which attach me to my brother, there is only one which attaches me to my half brother.

ARTICLE X. *In default of relations in the foregoing degrees, the property shall be applied to the revenue.*

ARTICLE XI. *But on condition of distributing the interest as an annuity among all the relations in the ascending line, in whatever degree, in equal portions.*

Remarks.—This part of the law may either be established or not, according to the condition of the country with regard to taxes; but I have been unable to discover any solid objection against this fiscal resource.

The collateral relation who would be excluded, it may be said, may be in want; but this want is an incident too casual for the foundation of a general rule. They have for their natural resource the property of their respective ancestors; and they cannot have fixed their expectations or their plan of life upon this foundation.

On the side even of the uncle, the expectation of inheriting from a nephew can be but feeble, and a positive law would suffice to prevent its existence, or to extinguish it without violence. The uncle has not the titles of the father or grandfather. It is true, that in case of the death of these, the uncle may have taken their place, and filled the place of a father to his nephew. This is a circumstance which deserves the attention of the legislator. The power of leaving legacies may answer the end; but this means of obviating the inconveniences of the general law would be null in case the nephew should die before he became of age—before he had the faculty of making a will. If, therefore, it be desirable to soften this fiscal regulation, the first departure from the rule ought to be in favour of the uncle, either in relation to the principal or the interest.

ARTICLE XII. *In making division among many heirs, the mass ought to be put up for public sale, saving the right to make any other arrangement, if they are agreed.*

Remark.—This is the only method of preventing community of goods—an arrangement of which we have elsewhere shown the pernicious consequences. The goods of inheritance, which may possess a value in affection, will find their true price from the competition of the heirs, and will turn to the common advantage, without occasioning those disputes which produce durable animosities in families.

ARTICLE XIII. *In arranging the sale and division, every thing shall be referred to the oldest male of full age, saving to the law to make other arrangements, for fear of misconduct, upon cause stated.*

Remark.—Women in general are less apt in affairs of interest and embarrassment, than men. But a certain woman, in particular, may possess a superior aptitude, indicated by the general wish of the relations: she ought to obtain the preference.

ARTICLE XIV. *In default of a male of full age, every thing should be referred to the guardian of the oldest male, saving the discretionary power given in the preceding article.*

ARTICLE XV. *The succession which falls to the revenue for want of natural heirs, shall in like manner be sold by public auction.*

Remark.—Government is incapable of managing the greater portion of specific goods; their management costs too much; they yield little, and are liable to be destroyed. This is a truth which has been established almost to demonstration by Adam Smith.

It appears to me that this project of a law is simple, concise, easy to be understood; that it is little favourable to fraud, to diversity of interpretations; in short, that it is analogous to the affections of the human heart, to the habitual inclinations which arise from the social relations, and that consequently it is calculated to conciliate the approbation of those who judge from feeling, and the esteem of those who can appreciate reason.

Those who reproach this plan with being too simple, and discover, that at this price the law would no longer be a science, may find wherewith to satisfy, and even to astonish themselves, in the labyrinth of the English common law upon successions.

To give to foreigners an idea of these difficulties, it would be necessary to begin by a dictionary altogether new to them; since, when they should see the absurdities, the subtleties, the cruelties, the frauds, which abound in this system, they would imagine that they were reading a satire, and that it was intended to insult a nation, on other accounts so justly renowned for its wisdom.

On the other hand, it would be proper to show what has reduced this evil within sufficiently narrow limits: this is the right of making a will. It is only in successions upon intestacy, that it is necessary to pass through the tortuous routes of the common law. These wills may therefore be compared to the arbitrary pardons which correct the harshness of the penal laws.

CHAPTER V.

OF WILLS.

1. THE law cannot know individuals, nor accommodate itself to the diversity of their wants. All that can be required of it is, that it shall offer the best chance of supply-

ing these wants. It remains for each proprietor, who may, and who ought to know the circumstances in which those who depend upon him will be placed after his death, to correct the imperfections of the law in those cases which it could not foresee. The power of making a will, is an instrument placed in the hands of individuals for the prevention of private calamity.

2. This same power may also be considered as an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of families. The power of this instrument, it is true, may be turned in an opposite direction: happily these cases would always form the exceptions to the rule. The interest of each member of the family is, that the conduct of each should be conformable to virtue, that is to say, to general utility. Passion may produce accidental wanderings, but the law ought to regulate itself by the ordinary course of affairs. Virtue is the prevailing foundation of society: even vicious parents are found as jealous as others, of the honesty and reputation of their children. The man least scrupulous in his business would be in despair, if his secret conduct were known to his family: among these he never ceases to be the apostle of that honesty, of which he stands in need from those who serve him. In this respect, every proprietor may obtain the confidence of the law. Clothed with the power of making a will, which is a branch of penal and remuneratory legislation, he may be considered as a magistrate set over the little kingdom which is called a family, to preserve it in good order. This magistrate may do wrong, and it would even seem, that as he is not restrained in the exercise of his power, either by responsibility or publicity, he would be more liable to abuse it than any other magistrate: but this danger is more than counterbalanced by the bonds of interest and affection, which place his inclinations in accordance with his duties. His natural attachment to his children or his relations, is a pledge of his good conduct, which gives as much security as can be obtained for that of the political magistrate; so that, every thing considered, the authority of this non-commissioned magistrate, besides that it is absolutely necessary for minor children, will be more often found salutary than hurtful for adults themselves.

3. The power of making a will is advantageous under another aspect: it is a means of governing, under the character of *master*, not for the good of those who obey, as in the preceding article, but for the good of those who command. The power of the present generation is thus extended over a portion of the future, and the wealth of each proprietor is in some respect doubled. By means of an assignment upon a time when he shall be no more, he procures a multitude of advantages beyond what he actually possesses. By continuing beyond the term of their minority, the submission of children, the indemnity for parental cares is increased; an assurance is given to the parent against ingratitude; and though it would be more pleasant to think that such precautions were superfluous, yet, if we reflect upon the infirmities of old age, it will be perceived, that it is necessary to leave all these factitious attractions to serve as their counterpoise. In the rapid decline of life, it is proper to husband every resource; and it is not without advantage, that interest is made to act as the monitor of duty.

Ingratitude on the part of children, and contempt for old age, are not common vices in civilized societies; but it ought to be recollected, that, more or less, the power of making a will exists every where. Do these vices exist more frequently where this power is most limited? To decide this question, it would be necessary to observe what passes in the families of the poor, where there is little to leave: but still this ground of judgment would be defective, since the influence of this power, established in society by the laws, tends to form the general manners; and the general manners afterwards determine the sentiments of individuals. This power given to parents, renders parental authority more respectable, and the parent who, from his indigence, cannot exercise it, unwittingly profits by it, from the general habit of submission to which it has given birth.

However, in making the father a magistrate, it is proper to guard against making him a tyrant. If the children may do wrong, he may do wrong also; and though the power of punishing them may be given to him, it does not follow that he ought to be authorized to make them die of hunger. Thus the institution of what is called in France a *legitime*, is a suitable medium between domestic anarchy and tyranny. Even this *legitime*, parents ought to be allowed to take from their children, for causes determined by the law and judicially proved.

Another question presents itself: Shall a proprietor be allowed to leave his property to whom he pleases, whether distant relations or strangers, in default of natural heirs? In this case, the fiscal resource of which we spoke under the head of successions, would be much diminished; it would only exist in the case of intestates. Here the reasons of utility divide themselves: there is a medium to be taken.

On the one side, in default of relations, the services of strangers are necessary to a man, and his attachment to them is almost the same. It is necessary that he should be able

to cultivate the hopes, and recompense the cares, of a faithful servant — to soften the regrets of the friend who has grown old by his side; without speaking of the female who has wanted only a ceremony in order to be called his widow, and of orphans who are his children in the eyes of every body except the legislator.

On the other hand, if to increase the inheritance of the public treasury you take from him the power of leaving to his friends, do you not force him to spend all upon himself? If his capital will be no longer at his disposal the moment he is dead, will he not be tempted to convert it into annuities upon his own life? will it not encourage his being a spendthrift, and almost operate as a law against economy?

These reasons are without doubt to be preferred to the interest of the revenue. It is necessary at least to leave to the proprietor who has no near relations, the right of disposing of the half of his property after his death, keeping the other half for the public. To be content in this case with the smaller share, would probably be a means of obtaining more. But it would be still better not to attack the principle which permits every one to dispose of his property after his death, and not to create a class of proprietors who should regard themselves as inferior to others, on account of this legal impotence which should have struck the half of their fortune.

All that has been said respecting alienations among the living may be properly applied to wills. Upon the greater number of points, we shall be instructed by their conformity, and in the others by the contrast.

The same causes of nullity which apply to alienations among the living, apply to wills, except that, in the case of *undue concealment* on the part of the receiver, there must be substituted *erroneous supposition* on the part of the testator. The following is an example: — I leave a certain property to Titius, who is married to my daughter, supposing this marriage legal, and ignorant of the dishonesty of Titius, who, before espousing my daughter, had contracted another marriage, which was still subsisting.

Wills are exposed to a sufficiently unfortunate dilemma. Shall their validity be permitted, when made upon the bed of death? They are then exposed to undue coercion and fraud. Shall formalities incompatible with this indulgence be required? Testators will then be liable to be deprived of assistance at the moment of their greatest need. Barbarous heirs may torment them, in order to hasten their death, or secure the advantage of a will passed in these forms. A dying person who has nothing to give or to take away is no longer to be feared. In order to reduce these opposite dangers to the lowest term, a multitude of details would be required.

CHAPTER V

OF RIGHTS RESPECTING SERVICES — MEANS OF ACQUIRING THEM

AFTER *things*, it remains to distribute *services:* a kind of property sometimes confounded with things — sometimes presenting itself under a distinct form.

How many kinds of services are there? As many as there are ways in which man may be useful to man, either by procuring good for him, or by preserving him from evil.

In the exchange of services which constitutes social intercourse, some are free, some are forced. Those which are required by the law, constitute rights and obligations. I have a right to the services of another; he is in a state of *obligation* with regard to me: these two terms are correlative.

In their origin, all services must have been free: it is only by degrees that the laws have intervened to convert the more important into positive rights. It is thus that the institution of marriage has converted into legal obligations the connexion which formerly was voluntary between the husband and wife, between the father and the children. The law in the same manner has converted into an obligation, in certain states, the support of the poor, a duty which still remains amongst most nations in undefined liberty. These political duties are, with respect to duties purely social, the same as particular inclosures in a vast common, in which a certain kind of cultivation is tended with precautions which insure its success. The same plant might grow in the common, and even be protected by certain conventions; but it would always be subject to more hazards than in this particular boundary traced by the law, and guaranteed by the public force.

Still, whatever the legislator may do, there are a great number of services upon which he has no hold: he cannot direct them, because it is not possible to define them, and even because constraint would change their nature, and convert them into evils. For the punishment of their violation, such an apparatus of research and of punishments would be required, as would spread terror through society. Besides, the law does not know the real obstacles which prevent their being rendered: it cannot put into activity hidden forces; it cannot create that energy, that superabundance of zeal, which surmounts difficulties, and goes a thousand times farther than commands.

The imperfection of the law upon this point is corrected by a species of supplemental law; that is to say, by the moral or social code — a code which is not written —

which consists altogether in opinion, in manners, customs—and which begins where the legislative code ends. The duties which it prescribes—the services it imposes, under the names of equity, patriotism, courage, humanity, generosity, honour, disinterestedness, do not directly borrow the assistance of the laws, but derive their strength from other sanctions which lend their punishments and rewards. As the duties of this secondary code do not bear the impress of the law, their discharge has more eclât—is more meritorious; and this surplus in honour happily compensates for their deficiency in real strength. After this digression respecting morals, let us return to legislation.

The kind of services which occupy the most prominent place consists in the disposal of property in favour of another.

The kind of property which acts the greatest part in civilized society is money, the almost universal representative standard. It is thus that the consideration of *services* often leads back into that of *things*.

There are some cases in which it is necessary to require the service for the advantage of him who commands it: such is the case of the master with relation to the servant.

There are some cases in which it is necessary to require the service for the advantage of him who obeys: such is the case of the guardian and ward. These two correlative states are the foundation of all others. The rights which belong to them are the elements of which all the other states are composed.

The father ought to be, in certain respects, the guardian—in others, the master of the child. The husband ought to be, in certain respects, the guardian—in others, the master of the wife.

These conditions are capable of a definite and indefinite duration, and form domestic society. The rights which it is proper should belong to them will be treated of separately. The public services of the magistrate and the citizen constitute other classes of obligations, the establishment of which belong to the constitutional code. But besides these constant relations, there are some transitory and occasional relations in which the law may require the services of an individual in favour of another.

The means of acquiring these services, or, in other words, the causes which determine the legislator to create these obligations, may be referred to three heads: 1. *Superior need.* 2. *Former service.* 3. *Agreement or Contract.* Let us consider these heads in detail.

1. *Superior Need;*

That is to say, *need of receiving the service, superior to the inconvenience of rendering it.*

Every individual has for his constant occupation the care of his own welfare—an occupation no less legitimate than necessary: for suppose that it were possible to reverse this principle, and to give to the love of others a superiority over self-love, the results of this arrangement would be most ridiculous and disastrous. There are, however, many occasions, in which it is possible to make a considerable addition to the happiness of others, by a slight and almost imperceptible sacrifice of one's own. To do, in certain circumstances, what depends upon us for preventing the evil ready to fall upon another, is a service which the law may require: and the omission of this service, in the cases in which the law has exacted it, would be a kind of offence which might be called a *negative* offence, in order to distinguish it from a *positive* offence, which consists in being one's self the instrumental cause of an evil.

But to employ one's efforts, however light they may be, may be an evil: to be constrained to employ them is certainly one, for all constraint is an evil. Hence, in order to exact from *you* some service in favour of *me*, the evil of not receiving it ought to be so great, and the evil of rendering it so small, that no one ought to fear to undergo the one, for the prevention of the other: there is no means of fixing the precise limits. Reference must be made to the circumstances of the parties interested, by leaving to the judge the care of pronouncing upon the cases of individuals as they present themselves.

The good Samaritan, by assisting the wounded traveller, saved his life. It was a noble action, a trait of virtue; we may say more, it was a moral duty. Ought it to have been made a political duty?—ought an action of this kind to be commanded by a general law? No; not, at least, unless tempered by exceptions more or less vague. It would be proper, for example, to establish a dispensation in this case in favour of a surgeon attending upon many wounded persons in extreme danger—or of an officer going to his post to repel the enemy—or of the father of a family going to the assistance of one of his children in danger.

This principle of *superior need* is the foundation of many obligations. The duties required of a father towards his children may be burthensome to him; but this evil is nothing, in comparison of the evil which would result from their neglect. The duty of defending the state may be still more burthensome; but if the state were not defended, it would not exist. When the taxes are not paid, the government is dissolved. When public functions are not discharged, the course is open for all kinds of misfortunes and all kinds of crimes.

It must be understood that the obligation of rendering the service falls upon a certain individual, in consequence of his particular

situation, which gives him, more than any other one, the power or the inclination of discharging it. It is thus that a guardian for orphans is chosen from among their relations or friends, to whom this duty will be less burthensome than to a stranger

2. *Former Service* —

Service rendered, in consideration of which there is required of him who received the benefit, an indemnity, an equivalent, in favour of him who has supported the burthen.

Here the object is more simple: it is only necessary to value a benefit already received, in order to assign an indemnification. Less latitude need be left to the discretion of the judge.

A surgeon has given his assistance to a sick person who had lost all feeling, and who was not in a condition to send for him. A depositary has employed his labour, or has made pecuniary advances necessary for the preservation of the deposit, without being required so to do. A man has exposed himself during a fire, to save valuable property, or to rescue persons in danger. The property of an individual has been thrown into the sea, to lighten the vessel and preserve the rest of the cargo. In all these cases, and in a thousand others which might be imagined, the laws ought to secure an indemnification as the price of the service.

This title is founded upon the best of reasons: Grant the indemnification, he who has supplied it will still be a gainer: refuse it, and you leave him who has rendered the service a loser.

This regulation would be less for the advantage of him who receives the indemnification, than for those who may stand in need of services: it would be a promise made beforehand, to every man who may have the opportunity of rendering a service burthensome to himself, for the purpose of preventing any opposition between his personal interest and his benevolence. Who shall say how many evils would be prevented by such a precaution? In how many cases has not prudence arrested the legitimate desires of benevolence? Would it not be wisdom on the part of the legislator, as much as possible to reconcile them? Ingratitude, it is said, was punished at Athens as a species of fraud which obstructed the communication of benefits, by weakening this kind of credit. I do not propose to punish, but to prevent it in many cases. If the man to whom you have rendered a service is ungrateful, it is of no consequence: the law, which does not reckon upon virtues, secures you an indemnity, and on essential occasions will make the indemnity rise to a reward.

Reward! this is the true means of obtaining services: in comparison with this, punishment is a feeble instrument. In order properly to punish the omission of a service, it is proper to be sure that the individual had the power of rendering it — that he had not an excuse for not rendering it. All this requires a difficult and doubtful procedure: besides, as it acts by means of the fear of punishment, that only will be done which is absolulely necessary for avoiding the punishment. But the hope of reward animates the hidden powers, triumphs over real obstacles, and gives birth to prodigies of zeal and ardour, in cases in which threats would have only produced repugnance and dejection.

In arranging the interest of the two parties, three precautions should be observed: first, to prevent a hypocritical generosity from converting itself into tyranny, and requiring the price of a service that would not have been received, if it had not been believed to be disinterested: the second is, not to allow a mercenary zeal to snatch a reward for services that might have been rendered by the party to himself, or obtained at a less expense: the third is, not to allow a man to be overwhelmed by a crowd of assistants, who can only be fully indemnified by exchanging for a loss all the advantage of the service.*

It is easily understood that *former service* forms a justifying base to many classes of obligations. It is upon this that the rights of parents over their children are founded: when, in the order of nature, the strength of adult age succeeds to the weakness of early years, the necessity of receiving ceases, and the duty of restitution begins. It is upon this that the rights of wives, during the period of the union, is equally founded, when time has effaced the attractions which were its first moving causes.

Establishments at the public expense for those who have served the state, repose upon the same principle. Reward for past services is an instrument for creating future services.

3. *Agreement or Contract;*

That is to say, *the making a promise between two or more persons, upon the understanding that it is regarded as legally binding.*

All that has been said relative to *consent* in the disposal of property, applies to *consent* in the disposal of services: The same reasons for sanctioning this disposal as for sanctioning the other — the same fundamental axiom — *every alienation of service implies advantage:* no one will bind himself except from a motive of utility.

* This may be applied to the situation of a King re-established on the throne of his ancestors, as Henry IV. or Charles II., at the expense of his faithful servants — an unfortunate situation, in which discontent is still increased, unless the kingdom itself, reconquered by their efforts, be distributed among them in detail.

The same reasons which annul consent in the one case, annul it in the other — undue concealment, fraud, coercion, subornation, erroneous supposition of legal obligation, erroneous supposition of value, interdiction, infancy, madness, pernicious tendency of the execution of the contract without fault of the contracting parties.*

We shall not dwell upon the following causes which produce the dissolution of a contract: — 1. *Accomplishment;* 2. *Compensation;* 3. *Express or tacit remission;* 4. *Lapse of time;* 5. *Physical impossibility;* 6. *Intervention of superior inconvenience.* In all these cases, the reason which had sanctioned the service no longer exists; but the two last bear only upon the literal or specific accomplishment, and may leave occasion for an indemnity. If, in a reciprocal contract, one of the parties alone have performed his part, or if he have only done more than the other, compensation becomes necessary for the restoration of an equilibrium.

An exhibition of principles only, is here attempted, without attending to the details: arrangements must necessarily vary, to correspond with the diversity of circumstances. At all times, if a small number of rules are well understood, particular arrangements will not create much difficulty, and may be all directed by the same spirit. The following rules appear sufficiently simple, to allow their developments to be passed by: —

1. Avoid producing the pain of disappointment.

2. When a portion of this evil is inevitable, diminish it as much as possible, by dividing all loss among the parties interested, in proportion to their property.

3. Observe, in the distribution, to throw the greater part of the loss upon him who ought, by his attention, to have prevented the evil, in such manner as to punish his negligence.

4. Avoid especially the production of an accidental injury greater than the evil of the disappointment.

General Observation.

We have laid the foundation of the whole theory of obligations in utility: we have supported the whole of this vast edifice upon three principles: *Superior Need, Former Service, Agreement or Contract.* Who would believe that, to arrive at notions so simple, and even so familiar, it has been necessary to open a new route? Consult the masters of the science — Grotius, Puffendorf, Burlamqui, Vattel, even Montesquieu himself, Locke, Rousseau, and the crowd of commentators: do they wish to ascend to the principle of obligations? They speak of a natural right, of a law anterior to man, of the divine law, of conscience, of a social contract, of a tacit contract, &c. &c. I know that these terms are not incompatible with the true principle; because there is not one of them that may not be brought, by explanations more or less long, to signify some good or some evil. But this oblique and winding method announces uncertainty and embarrassment, and does not put an end to disputes.

They have not seen that a contract, speaking rigorously, is no reason in itself, and that it requires a foundation — a first and independent reason. A contract serves to prove the existence of the mutual advantage of the parties contracting. It is this reason of utility which gives it force: it is by this that the cases may be distinguished in which it ought to be confirmed, from those in which it ought to be annulled. If a contract constituted a reason in itself, it would always have the same effect; if its pernicious tendency render it void, it is then its useful tendency which renders it valid.

CHAPTER VI.

COMMUNITY OF GOODS—ITS INCONVENIENCES.

THERE is no arrangement more contrary to the principle of utility, than community of goods, especially that kind of indeterminate community in which the whole belongs to every one.

1. It is an inexhaustible source of discord: far from being a state of satisfaction and enjoyment, for all parties interested, it is one of discontent and disappointment.

2. This undivided property always loses a great part of its value to all the co-partners. Subject, on the one hand, to dilapidations of every kind, because it is not under the protection of personal interest; on the other hand, it receives no improvement. Why should I undertake an expense of which the burthen will be certain, and will fall altogether on myself, whilst the advantage will be precarious, and necessarily divided.

3. The apparent equality of this arrangement would only serve to hide a real inequality. The strongest would abuse his strength with impunity, the richest would enrich themselves at the expense of the poorest. Community of goods always recalls the idea of that kind of monster which is sometimes found to exist; that is, of twins attached by the back to one another—the stronger necessarily draws the weaker along.

Reference is not here made to the community of goods between husbands and wives: called to live together, to cultivate their own interests and those of their children together

* It is to this head that the English law may be referred, which declares every marriage void, contracted by persons of the royal family without the consent of the king.

they ought to enjoy together a fortune often acquired, and always preserved by their common cares. Besides, if their wills cross each other, the conflict will not be eternal, the law having confided to the man the right of decision.

Reference is also not made to this community between associates in commerce. This community has acquisition for its object, and does not extend to enjoyment. Now, when it refers to acquisition, the associates have only one and the same object, one and the same interest; when it refers to enjoyment and consumption, each becomes independent of the other: besides, the associates in commerce are few in number; they are freely chosen, and they can separate from each other. It is precisely otherwise in common property.

In England, one of the greatest and best understood improvements is the division of commons. When we pass over the lands which have undergone this happy change, we are enchanted as with the appearance of a new colony: harvests, flocks, and smiling habitations, have succeeded to the sadness and sterility of the desert. Happy conquests of peaceful industry! noble aggrandisements, which inspire no alarms and provoke no enemies! But who would believe it, that in this island, where agriculture is so well understood, and so much esteemed, that millions of acres of productive land are abandoned to this sad state of commonalty. It is not long since that the Government, desirous of knowing its territorial domains, has collected in each district all the facts which have made known this interesting truth, so well adapted to become fruitful.*

The inconveniences of community are not experienced in the case of servitudes; that is to say, in the partial rights of property exercised over immovables (as a right of way, or right of water,) except by accident. These rights are in general limited; the value lost by the land serving is not equal to the value acquired by the land served; or in other words, the inconvenience to the one is not so great as the advantage to the other.

In England, freehold land which is worth thirty years purchase, would not be worth more than twenty years purchase if it were copyhold. This arises from there being in the latter case a lord of the manor possessing certain rights, which establish a kind of community between him and the principal proprietor. But it must not be thought that what is lost by the vassal is gained by the lord: the greater part falls into the hands of the lawyers, and is consumed in useless formalities or vexatious triflings. These are remains of the feudal system.

"It is a beautiful sight," says Montesquieu, of the feudal law; and he afterwards compares it to an old and majestic oak. We may the rather compare it to that fatal tree, the manchineel tree, whose juices are poisons to man, and whose shade is destructive to vegetation. This unfortunate system has infused into the laws confusion and complexity, from which it is difficult to deliver them. As it is every where interwoven with property, it requires much management to destroy the one without injuring the other.

CHAPTER VII.

OF DISTRIBUTION OF LOSS.

Things form one branch of the objects of acquisition: *Services* form another. After having treated of the different methods of acquiring and losing (ceasing to possess) these two classes of objects, the analogy between gain and loss seems to indicate, as an ulterior labour, the different methods of distributing the losses to which these possessions are liable. This task will not be very long. An article comes to be destroyed, damaged, lost? The loss is already experienced. Is the proprietor known? upon him the weight of this loss rests. Is he not known? no one bears it: it is, as to every body, as null, and as if it had not happened. Ought the loss to be transferred to any other than the proprietor? that is to say, in other words, is there due to him a satisfaction, either from one cause or another? This is a subject which will be discussed in the Penal Code.

A single particular case will here suffice, as an indication of the principles.

When the buyer and seller of merchandise are at a distance from each other, it must necessarily pass through a number, more or less, of intermediate hands. It may be carried by land or by water: the merchandise becomes destroyed, damaged, or lost: it does not reach its destination in the condition in which it ought to be: upon whom shall the loss fall? upon the seller or the buyer? I say upon the seller, saving his recourse against the intermediate agents. He may by his care contribute to the security of the merchandise: it is for him to choose the moment and the manner of sending it, to take the necessary precautions: on him depends the proof. All this ought to be more easy to the merchant who sells, than to the particular individual who buys: whilst, as to him, it is only by

* There may be some circumstances not included in ordinary rules: the citizens of the smaller Swiss Cantons, for example, possess in common the greater portion of their lands, that is to say, the High Alps. It is possible that this arrangement may alone be suitable for pastures which are only accessible for part of the year. It is possible that this manner of holding their lands forms the base of a purely democratic constitution, suited to a people shut up in the bosom of their mountains.

accident that his cares can contribute in any manner to bring about the desired event.—*Reason*, Superior preventive faculty. *Principle*, Security.

Particular situations may indicate the necessity of departing from this general rule, by corresponding dispositions. For a much stronger reason, individuals may depart from it themselves, by agreements made among themselves. Indication can here only be made of the principles: their application would be out of place.

PART III.

OF THE RIGHTS AND OBLIGATIONS ATTACHED TO DIFFERENT PRIVATE CONDITIONS.

INTRODUCTION.

WE now proceed to consider in greater detail the rights and obligations which the law attaches to the different conditions which compose the domestic or private condition. These conditions may be divided into four—those of Master and Servant;
Guardian and Ward;
Parent and Child;
Husband and Wife.

If we were to follow the historical or the natural order of these relations, the last in the list would become the first: for the sake of avoiding repetitions, beginning with the most simple object has been preferred. The rights and obligations of a father and a husband are composed of the rights and obligations of a master and a guardian; these two first conditions are the elements of all the others.

CHAPTER I.

OF MASTER AND SERVANT.

WHEN the question of slavery is not considered, there is little to say respecting the condition of *master* and its correlative conditions, constituted by the different kinds of servants. All these conditions are the effects of contracts; these contracts the parties interested may arrange to suit themselves.

The condition of *master*, to which the condition of apprentice corresponds, is a mixed condition: the master of an apprentice is at the same time master and tutor; tutor for the art which he teaches, master as to the profit which he derives from him.

The work that the apprentice does, after the period at which the produce of his labour is worth more than what it costs to develope his talent, is the salary or reward of the master for his former pains and expenses.

This salary will naturally be greater or less according to the difficulty of the art. Some arts may be learnt in seven days; others may require seven years. The competition among the dealers regulates the price of these mutual services, as well as of all other objects of commerce: and here, as in other cases, industry finds its just reward.

The greater number of governments have not adopted this free system. They have sought to establish what they call order among the professions; that is, to substitute an artificial for a natural arrangement, that they might have the pleasure of regulating that, which would regulate itself. As they have meddled with what they did not understand, they have been most frequently led by an idea of uniformity in objects of very different natures. For example, the ministers of Elizabeth fixed the same term of apprenticeship, the term of seven years, for the most simple as well as for the most difficult arts.

The regulating mania disguised itself under a common pretext. It would perfect the arts; it would prevent there being any bad workmen; it would secure the credit and the honour of the national manufactures. For the accomplishment of this object, a natural and simple method presented itself: permission to every one to use his own judgment, to reject the bad, to choose the good, to determine his preferences by merit, and thus to excite emulation in all the artists by the liberty of competition. But no:—it determined that the public was not in a condition to judge of the quality of any work; but so soon as a workman had been employed upon a certain kind of labour a certain number of years, his work ought to be regarded as good. That the proper question to be asked respecting an artisan is not, does he work well? but how long has been his apprenticeship? for if it be necessary still to judge of work by its merit, so much the better would it be to allow every one liberty to work at his own peril and risk.

One might then be a master without having served an apprenticeship; another might remain all his life only an apprentice.

CHAPTER II.

OF SLAVERY.

WHEN the habit of serving forms a condition, and the obligation of continuing in this con-

dition with respect to a certain individual, or to others who derive their titles from him, embraces the whole life of the servant, this condition is called slavery.

Slavery is susceptible of many modifications and alleviations, according to the greater or less certainty of the services which it is permitted to exact, and according to the means of coercion which it is permitted to employ. There was a great difference between the condition of a slave at Athens and Lacedemon; there is still more between that of a Russian serf and a negro in the southern states of America. But whatever may be the limits as to the modes of exercising authority, if the obligation of service be unlimited in point of duration, I always call it *slavery*. In drawing the line of separation between slavery and freedom, it is necessary to stop at some point, and this appears the most prominent and the most easily proved.

This characteristic mark drawn from its *perpetuity*, is so much the more essential, in as much as, wherever it is found, it weakens, it enervates, it renders more or less precarious the most prudent precautions for the mitigation of authority. Unlimited power, in this sense, can with difficulty be limited in any other. If we consider, on the one hand, the facility which the master possesses of aggravating his yoke by degrees; of rigorously exacting the services which are due to him; of extending his pretensions under divers pretexts; of seeking out opportunities for tormenting an insolent subject, who has dared to refuse that which he did not owe: if we consider, on the other hand, how difficult it is for slaves to claim and obtain legal protection; how much more distressing their domestic condition becomes after a public struggle against their master; how much rather they are led to seek his favour by unlimited submission, than to irritate him by refusal; — we shall easily perceive that the project of mitigating slavery by law, is more easily formed than executed; that the fixation of services is a very feeble instrument in the mitigation of the lot of slavery; that under the empire of the best laws in this respect, their most flagrant infractions only will be punished, whilst the ordinary course of domestic rigour will mock all tribunals. I do not, therefore, say that slaves ought to be abandoned to the absolute power of the master; that they ought not to receive any protection from the laws, because this protection is insufficient. But it was necessary clearly to point out this circumstance, to show the evil inherent in the nature of slavery, namely, the impossibility of subjecting the authority of a master over his slaves to legal restraint, and of preventing the abuse of his power, if he be disposed to abuse it.

That slavery is agreeable to the masters, is not doubtful — since they could, in an instant, cause it to cease if they wished so to do; that it is disagreeable to the slaves, is a fact no less certain—since they are only retained in this condition by restraint. No one who is free is willing to become a slave; no one is a slave but he wishes to become free.

It is absurd to reason as to the happiness of men, otherwise than with a reference to their own desires and feelings. It is absurd to seek to prove by calculation, that a man ought to be happy when he finds himself miserable, and that a condition into which no one is willing to enter, and which every one desires to leave, is in itself a pleasant condition, and suited to human nature. I can easily believe that the difference between liberty and slavery is not so great as it appears to be to some ardent and prepossessed minds. Being accustomed to the *evil*, and much more, never having experienced the *better* condition, the interval which separates these two conditions, which at first sight appear so opposed, is greatly diminished. But all reasonings upon probabilities are superfluous, since we have proofs of the fact, that this condition is never embraced from choice, but, on the contrary, that it is always an object of aversion.

Slavery has been compared to the condition of a scholar prolonged during life; and how numerous are the persons, who have said that the time passed at school was the happiest period of their life?

The parallel is correct only in one respect. The circumstance common to the two conditions is subjection; but it is any thing rather than this circumstance which produces the happiness of the scholar. That which renders him happy, is the freshness of spirit, which gives to all his impressions the charm of novelty; it is the comparison of the noisy and active pleasures in which he engages with companions of his own age, with the solitude and the quiet of his father's house. And after all, how many are the scholars who have sighed for the moment when this condition should cease? Who among them would resolve to remain a scholar always?

If it could be arranged in such a manner that slavery should be so established that there should be only one slave to one master, there might be ground for hesitation in pronouncing before-hand which would have the advantage, and which the disadvantage; and it might be possible, that, all things considered, the sum of good in this arrangement would be nearly equal to that of evil.

But things are not thus arranged. As soon as slavery is established, it becomes the lot of the greatest number. A master counts his slaves as his flocks, by hundreds, by thousands, by tens of thousands. The advantage

is only on the side of a single person; the disadvantages are on the side of the multitude. If the evil of slavery were not great, its extent alone would suffice to make it considerable. Generally speaking, and every other consideration apart, there can, therefore, be no ground for hesitation between the loss which would result to the masters from enfranchisement, and the gain which would result from it to the slaves.

Another strong argument against slavery may be drawn from its influence upon the wealth and power of nations. A free man produces more than a slave. Set at liberty all the slaves which a master possesses, this master would, without doubt, lose a part of his property; but the slaves, taken together, would produce not only what he lost, but still more. But happiness cannot but be augmented with abundance, whilst public power increases in the same proportion.

Two circumstances concur in diminishing the produce of slaves: the absence of the stimulus of reward, and the insecurity of their condition.

It is easily perceived, that the fear of punishment is little likely to draw from a labourer all the industry of which he is capable, all the work that he can furnish. Fear leads him to hide his powers, rather than to show them; to remain below, rather than to surpass himself.

By a work of supererogation, he would prepare punishment for himself: he would only raise the measure of his ordinary duties by displaying superior capacity. His ambition is the reverse of that of a free man; and he seeks to descend in the scale of industry, rather than to ascend. Not only does he produce less; he consumes more, not in enjoyment, but lavishly, wastefully, and by bad economy. Of what importance to him are interests which are not his own? Every thing which saves his labour is a gain for him; every thing which he allows to be lost, is only the loss of his master. Why should he invent new methods of doing more or doing better? In making improvements, he must think; and thinking is a labour to which no one gives himself without a motive. Degraded to a beast of burden, a slave never raises himself above a blind routine, and one generation succeeds another without any progress in improvement.

It is true that a master, who understands his own interests, will not dispute with his slaves the little profits which their industry may furnish to them: he will not be ignorant that their prosperity is his own, and that to animate them to labour, he must offer them the allurement of an immediate reward. But this precarious favour, dependent on the character of the individual, is not sufficient to inspire in them that confidence which directs the views to the future, which shows in the savings of to-day the foundation of future wealth, and which leads to extended projects respecting the fortune of their children. They well understand, that the richer they are the more they are exposed to extortion, if not from their master, at least from his agents, and all their subordinates in authority, more greedy and more formidable than their master. There is, therefore, no to-morrow for the greater number of slaves. The enjoyments which are realized at the instant are those alone which can tempt them. They, therefore, become gluttons, idle, dissolute, without reckoning the other vices which result from their situation. If they have a longer foresight, they hide their little treasures. All the faults destructive of industry, and all the habits most mischievous to society, are nourished in them by the sad feeling of insecurity, without compensation and without remedy. This result is not the deduction of a vain theory, it is a result drawn from facts, in all times and all places.

But it is said, the free labourer in Europe is very nearly upon the same footing, with regard to labour, as the slave. He who is paid by the piece has reward for his motive, and each effort has its payment. He who is paid by the day has no other motive than punishment; whether he does little or much, he receives only his day's wages, therefore he has no reward. If he does less than usual, he may be discharged, as the slave in the same case may be beaten; the one and the other are excited only by fear, and have no interest in the produce of their labour.

Three things may be replied:—1. It is not true that the day-labourer has not the motive of reward. The most skilful and the most active are better paid than others; those who distinguish themselves are more constantly employed, and are always preferred for the most lucrative employments: here, then, is a real reward which accompanies all their efforts.

2. If he were actuated by no other than penal motives, there would be still more hold upon the day-labourer than upon the slave. The free labourer has his point of honour as well as others. In a free country, shame attaches to the character of an idle or unskilful workman; and in this respect the eyes of his companions are so many helpers to those of the master: this punishment of the popular sanction is inflicted upon a multitude of occasions, by judges who have no interest in sparing it. Hence they exercise reciprocal inspection, and are sustained in their efforts by emulation. This motive has much less force upon slaves: the treatment to which they are subject renders them but little sensible of so delicate a punishment as that of shame; and as the injustice of labouring for the advantage of another, without indemnifi-

cation, has not escaped their observation, slaves have no shame in acknowledging one to another a dislike to labour, which is common to them all.

3. Whatever appears to the day-labourer as a gain, is a certain gain; every thing which he acquires is his own, and no one else has a right to touch it: but we have seen that there is no real security for the slave. Exceptions in this respect may be cited. Some Russian nobleman, for example, may possess industrious slaves who possess many thousands of roubles, and who enjoy them as their master enjoys his property; but these are particular cases, which do not alter the ordinary rule. When a judgment is to be formed respecting a general arrangement, it is not necessary to stop at these singular and transient cases.

In this short exposition of the inconveniences of slavery, no attempt has been made to excite emotion, nothing has been addressed to the imagination, no odious character has been thrown upon masters in general: by generalizing particular abuses of power, nothing has been said of the terrible methods of rigour and constraint employed in their domestic government, without law, without process, without appeal, without publicity, and almost without restraint: since responsibility, as we have seen, can only exist in extraordinary cases. Every thing which belongs to feeling may be easily accused of exaggeration, but the simple evidence of reason cannot be gainsayed, and it is so strong there can be no need to employ any suspicious colours. The proprietors of slaves, whom personal interest has not made insensible to feeling and humanity, must acknowledge the advantages of liberty, and desire the abolition of slavery, if this abolition could take place without overturning their own condition and their fortunes, and without attacking their personal security. The injustice and the calamity which have accompanied precipitate attempts, form the greatest objection against projects of emancipation.

This operation need not be suddenly carried into effect by a violent revolution, which, by displeasing every body, destroying all property, and placing all persons in situations for which they were not fitted, might produce evils a thousand times greater than all the benefits that can be expected from it.

Instead of rendering emancipation burthensome to the master, it ought, as much as possible, to be rendered advantageous to him: and the first means which naturally offers itself for this purpose, is to fix a price at which every slave shall have the right to purchase his freedom. Unhappily this means is exposed to one strong objection: when the interest of the master is opposed to that of the slaves, he would prevent their obtaining the sum fixed for their ransom. To leave them in ignorance, to keep them in poverty, to clip their wings in proportion as they grew—such would be his policy. But there is this danger only in fixing the price: the liberty of purchasing his freedom by mutual consent has no such inconvenience. The interest of the slave will lead him to work well for himself, that he may have a large price to offer. The interest of the master will lead him to allow his slave rapidly to enrich himself, that he may derive the greater ransom from him.

A second method consists in limiting the right of making a will, in such manner, that in those cases where there is no successor in the direct line, emancipation should be of right. The hope of inheritance is always very weak in distant successions, and this hope would no longer exist when the law became known. There would be no injustice, when no expectation was disappointed.

It would be possible even to go a step further: at each change of ownership, even in the nearest successions, a small sacrifice might be made of property in favour of liberty: for example, a tenth part of the slaves might be set at liberty. An inheritance which has just devolved does not present to the heir a determinate value. The diminution of a tenth would be scarcely sensible. At this period this would be less a loss than a privation of gain. Upon nephews, who have, from another side, received an inheritance from their fathers, the tax in favour of liberty might be still heavier.

This offering to liberty ought to be determined by lot. Choice, under the pretext of honouring the most worthy, would be a source of cabals: it would cause more discontent and jealousy than happiness. The lot is impartial; it gives all an equal chance of happiness; it spreads the charm of hope among those whom it does not favour; and the dread of being deprived of this chance, on account of any crime committed, would be another bond to the fidelity of the slaves.*

Emancipation ought to take place by families, rather than by individuals. A father a slave, and a son free; a son a slave, and a father free. The contrast is sad and shocking!—a source of domestic grief.

There are other means of accelerating this

* This method might give the slaves a temptation to employ murder to accelerate their emancipation. This is a very weighty objection against this lottery. It must, however, be observed, that even its uncertainty would weaken its danger. Few would be led to commit a crime of which they were not sure to reap the profit. But this temptation would vanish, if emancipation were not allowed to take place when the master had been poisoned or assassinated, either by one of his slaves, or by a person unknown. This means of liberation would thus become a source of security to the master.

desirable object; but they can only be discovered by studying the particular circumstances of each country.

However, the bonds of slavery, which the legislator cannot break by a single blow, time destroys by little and little; and the march of liberty, though slow, is not the less certain. All the progress of the human mind, of civilization, of morality, of public wealth, of commerce, hasten forward, by degrees, the restoration of individual liberty. England and France were once what Russia, the Polish provinces, and part of Germany, are at present.

Landowners need not be alarmed at this change. Those who possess the soil have a natural power over those who live by their labour. The fear that the emancipated bondsmen, once free, would remove, would abandon their native soil, and leave the earth uncultivated, is absolutely chimerical, especially if emancipation were effected in a gradual manner. Because the slave escapes when he can, it is not to be concluded that the free man will remove. The opposite conclusion would be more correct. The motive for flight no longer exists, and all the motives for remaining are strengthened.

In Poland, some landowners, enlightened as to their own interests, or animated by a love of glory, have effected a total and simultaneous emancipation in their vast seignories. Did this generosity cause their ruin? Altogether the contrary. The farmer, interested in his labour, has been in a condition to pay more than the slave; and their lands, cultivated by free hands, have received every year a new and increased value.

CHAPTER III.

OF GUARDIAN AND WARD.

THE weakness of infancy requires continual protection. Every thing must be done for the infant, which can do nothing for itself. The perfect development of its physical powers requires many years: the development of its intellectual faculties is more slow. At a certain age, it has already strength and passions, but it has not yet sufficient experience to regulate them. Too sensible of the present, and too little sensible of the future, it requires an authority more immediate than that of the laws; it requires to be governed by rewards and punishments, which do not act at long intervals, but continually, and which may be adapted to all the details of its conduct, during the progress of its education.

The choice of a situation in life, or of a profession for a child, also requires that he should be subject to a particular authority. This choice, founded upon personal circumstances, upon expectations, upon talents, or the inclinations of the young pupils; upon their facility of applying to one thing in preference to another—in a word, upon the probability of success; this choice is too complicated to be made by the public magistrate; each case requires particular consideration, and its decision such an acquaintance with particular details as a public magistrate cannot possess.

This power of protection and government, with respect to individuals considered incapable of protecting and governing themselves, constitutes Guardianship: a kind of domestic magistracy, founded upon the manifest wants of those who are subject to it, and which ought to comprehend all the powers necessary for attaining its end, without going beyond it.

The powers necessary for the education of a ward, are those of choosing his station, and fixing his habitation, together with the means of reprimanding and correcting him, without which authority would be inefficacious. These means may be the more easily reduced upon the side of severity, in proportion as their application is more certain, more immediate, and more easily varied, and because domestic government possesses an inexhaustible fund of rewards; since during the period in which every thing is received, there is no concession which may not be made to take the shape of reward.

With regard to the subsistence of the ward, it can only be derived from three sources; either his own property, or from gifts, or from his labour.

If the ward possess property, it is administered in his name and for his advantage by his guardian; and all that he does in this respect, according to prescribed forms, is ratified by the law.

If the ward have no property, he is supported either at the expense of the guardian, as is most commonly the case where the guardianship is exercised by the father or mother of the child; or at the expense of some charitable establishment; or, it may be, by his own labour, as in the case where his services are engaged in an apprenticeship, in such manner that the period of his non-value is compensated for by the subsequent period.

Guardianship being an office purely burthensome, this service is made to fall upon those who have the greatest inclination and facility for discharging it. The father and mother are eminently in this situation. Natural affection generally more strongly disposes them to it than the law; still, however, the law which imposes it on them is not useless. It is because children have been abandoned by the immediate authors of their being, that this abandonment has been constituted a crime.

If the dying father have appointed a guar-

dian to his children, it is presumed that no person has known better than he, who had the means and inclination to supply his place in this respect. Hence his choice should be confirmed, unless there be strong reasons to the contrary.

If the father have not provided a guardian, this obligation should fall upon a relation, attached by interest to the preservation of the family property, and by affection or honour to the welfare and education of the children. In default of a relation, some friend of the orphans should be chosen, who will voluntarily discharge this office: or some public officer should be appointed for this purpose.

It is proper to pay attention to the circumstances which may render guardianship unnecessary:—Advanced age, a numerous family, infirmities, or reasons of prudence and delicacy, for example, complication of interests, &c.

The particular precautions against the abuse of this power belong to the penal laws against offences:—an abuse of authority against the person of the ward, is referable to the class of personal injuries; illicit gains derived from his fortune, to that of fraudulent acquisitions, &c. The only thing to be considered is the peculiar circumstance of the offence, *the violation of confidence*. But though this renders the offence more odious, it is not always a reason for augmenting its punishment; on the contrary, we shall see elsewhere that it is often a reason for diminishing it: the position of the delinquent being more particular, the detection of the offence is more easy, reparation is more certain, and the alarm is less. In the case of seduction, the character of guardian is an aggravation of the offence.

As regards general precautions, guardianship has often been subject to division, by giving the administration of the property to the next of kin who is entitled to succeed to it, who, in character of heir, will have the greatest interest in increasing its value; and the care of the person to some other relation, more interested in the preservation of his existence.

Some legislators have taken other precautions, such as forbidding guardians to purchase the property of their wards, or of permitting to these to re-enter upon their property sold within a certain number of years after attaining their majority. Of these two methods, the first does not appear subject to great inconveniences; the second can only affect the interests of the ward, by diminishing the price of his lands, in as much as the value is diminished to the purchaser himself, in proportion as his possession is rendered precarious, and he is afraid to undertake improvements which might prove disadvantageous to him, by furnishing an additional motive for re-entry. Both these methods appear useless, if the sale of the property be only permitted to be made publicly, and under the inspection of the magistrate.

The most simple method is to allow any person to act in legal matters as the friend of the infant against his guardians, either in cases of malversation as to his property, or of negligence or violence. The law would thus put these feeble beings, who are unable to protect themselves, under the protection of every generous individual.

Pupillage being a state of dependence, is an evil which ought to cease as soon as it is possible, without occasioning a greater evil. But at what age ought this emancipation to take place? This question can only be decided by general presumptions. The English law, which has fixed the epoch at the age of twenty-one years, seems much more reasonable than the Roman law, which has been followed in almost every country in Europe, and which fixed it at twenty-five years. At twenty-five years old, the faculties of the man are developed; he is sensible of all his powers; he yields to advice what he refuses to authority, and will be not longer content to be restrained by the bonds of childhood: hence the prolongation of domestic authority often produces a state of animosity and irritation, equally hurtful to both the parties interested. But there are some individuals who never reach maturity, or who reach it much later than others. Provision may be made for these cases *by interdiction*, which is only a prolongation of guardianship during a prolonged childhood.

CHAPTER IV.

OF PARENT AND CHILD.

WE have already said, that in certain respects a parent is the master of his child, and in others the guardian.

In the character of a master, he will possess the right of imposing labour upon his children, and of employing their labour for his own advantage, until the age at which the law establishes their independence. This right which is given to parents, is an indemnity for the trouble and expense of the education of their children. It is desirable that parents should possess an interest, and take pleasure in the education of their children; whilst this advantage which they may find in rearing them, is not less a benefit for the one than the other.

In the character of guardian, a parent possesses all the rights and all the obligations of which mention has been made under that head.

Under the first relation, the advantage of the parent is considered; under the second, that of the child is considered. These two

characters are easily reconciled in the hands of a parent, in consequence of the natural affection which leads him rather to make sacrifices for his children, than to make use of his rights for his own advantage.

It would seem at the first glance, that the legislator need not interfere between parents and children, and that he might rely upon the tenderness of the one, and the gratitude of the others. But this superficial view would be deceptive. It is absolutely necessary, on one side, to limit the parental power, and on the other, to support filial respect by the laws.

General Rule. It is not proper to give any power, from the exercise of which the child may lose more than the father would gain.

When, in Prussia, the right was given to the father, in imitation of the Romans, of preventing his son from marrying without limitation of age, this rule was not observed.

Political writers have fallen into opposite excesses with respect to the parental authority. Some have sought to render it despotic, as among the Romans; others have sought to annihilate it. Some philosophers have thought that children ought not to be subject to the caprice and ignorance of parents; that the state ought to educate them in common. The systems of Sparta, Crete, and the ancient Persians, are cited in support of this plan. It is forgotten that this public education was only provided for a small class of the citizens; because the mass of the people was composed of slaves.

In this artificial arrangement, beside the difficulty of apportioning the expense, and the evil of making those parents support the burthen who no longer stand in need of the service, and who would no longer be actuated by a feeling of tenderness for their children, who would have become almost strangers to them, there would also arise a greater inconvenience to the pupils: they would not be early prepared for the diversity of conditions which they would be called to occupy. The choice even of a profession or business depends upon so many circumstances, upon which parents alone can determine, that no one else can judge of what is suitable for them, nor of the expectations nor of the talents and inclinations of these young pupils. Besides, this plan, in which the reciprocal affection between parents and children is reckoned as nothing, would be productive of the worst effects; by destroying family feeling — by weakening the conjugal union — by depriving the fathers and mothers of those pleasures which they derive from beholding this new generation which springs up around them. They would not seek the future welfare of children, who would no longer be their property, with the same zeal. They would not feel towards them a regard which they could not hope to inspire. Industry, no longer excited by paternal affection, would not possess the same activity. Domestic enjoyments would take a course less advantageous to general prosperity.

As a last reason, it may be added, that the natural arrangement, leaving the choice, the manner, and the expense of education to the parents, may be compared to a series of experiments, having for their object the perfection of the general system. Every thing is advanced and developed by this emulation of individuals; by the difference of views and thoughts — in a word, by the variety of particular impulses. But if every thing were cast in the same mould, if instruction every where partook of the character of legal authority, errors would be perpetuated, and there would be no improvement.

This, perhaps, may be considered too long a dissertation respecting a chimera: but this Platonic notion has in our days led certain celebrated authors astray; and an error which has entangled Rousseau and Helvetius, may easily find other defenders.

CHAPTER V.

OF MARRIAGE.

Inde casas postquam, ac pelles ignemque pararunt,
Et mulier conjuncta viro concessit in unum
Castaque privatæ veneris connubia læta
Cognita sunt, prolemque ex se videre creatam,
Tum genus humanum primum molescere cœpit.
LUC. V.

UNDER whatever point of view the institution of marriage is considered, the utility of this noble contract is striking. It is the bond of society, the foundation of civilization.

Marriage, considered as a contract, has drawn women from the hardest and most humiliating servitude; it has distributed the mass of the community into distinct families; it has created a domestic magistracy; it has trained up citizens; it has extended the views of men to the future, through their affection for the rising generation; it has multiplied the social sympathies. In order to estimate all its benefits, it is only necessary to imagine, for a moment, what would be the condition of Man without this institution.

The questions relative to this contract may be reduced to seven: — 1. Between what persons may it be permitted? 2. What shall be its duration? 3. Upon what conditions shall it be made? 4. At what age? 5. Who shall choose? 6. Between how many persons? 7. With what formalities?

§ 1. *Between what persons shall Marriage be permitted?*

If we here follow the guidance of historical facts, we shall be greatly embarrassed, or

rather, we shall be unable to deduce a single fixed rule from among the multitude of contradictory customs. Respectable examples are not wanting for authorising unions which we regard as most criminal, nor for prohibiting many which we consider altogether innocent. Every nation has pretended to follow, in this respect, what is called the law of nature, and has viewed with a kind of horror, as polluted and impure, every thing not conformed to its own matrimonial laws. Let us suppose ourselves ignorant of all these local institutions, and only consulting the principle of utility, let us examine between what persons it is proper to permit, and between whom to prohibit this union.

If we examine the interior of a family, composed of persons who differ among themselves in respect of age, sex, and relative duties, strong reasons will present themselves to our minds for prohibiting certain alliances between many individuals of this family.

I see one reason which directly pleads against allowing such marriages at all. A father, a grandfather, or an uncle holding the place of a father, might abuse his power in order to force a young girl to contract an alliance with him which might be hateful to her. The more necessary the authority of the parent is, the less temptation should be given to its abuse.

This inconvenience extends only to a small number of incestuous cases, and it is not the most weighty. It is in the corruption of manners, in the evils which would result from transitory connexions without marriage, that the true reasons for prohibiting certain alliances must be sought.

If there were not an insurmountable barrier against marriages between near relations, called to live together in the greatest intimacy, this close connexion, these continual opportunities, even friendship itself and its innocent caresses might kindle the most disastrous passions. Families, those retreats in which repose ought to be found in the bosom of order, and where the emotions of the soul, agitated in the scenes of the world, ought to sink to rest — families themselves would become the prey of all the inquietudes, the rivalries, and the fury of love. Suspicion would banish confidence; the gentlest feelings would be extinguished; and eternal enmities and revenges, of which the idea alone makes one tremble, would usurp their place. The opinion of the chastity of young women, so powerful an attraction to marriage, would not know upon what to repose, and the most dangerous snares in the education of youth would be found even in the asylum where they could be least avoided.

These inconveniences may be arranged under four heads: —

1. *Evil of Rivalry.* — Danger resulting from a real or suspected rivalry between a bridegroom and certain persons of the number of his relations or connexions.

2. *Hindrance of Marriage.* — Danger of depriving the daughters of the chance of forming a permanent and advantageous establishment by means of marriage, by diminishing the security of those who may desire to espouse them.

3. *Relaxation of Domestic Discipline.* — Danger of inverting the relations among those who ought to command, and those who ought to obey; or, at least, weakening the tutelary authority, which, for the interests of minors, ought to be exercised over them by the heads of the family, or those who hold their place.

4. *Physical Injury.* — Dangers which may result from premature indulgences, with respect to the development of the powers and the health of the individuals.

Table of Alliances to be prohibited.

A man ought not to marry:

1. The Wife or Widow of his Father, or any other of his Progenitors. Inconveniences	1, 3, 4
2. Any one of his Descendants. Inconveniences - - -	2, 3, 4
3. Any one of his Aunts. Inconveniences - - - -	2, 3, 4
4. The Wife or Widow of any one of his Uncles. Inconveniences	1, 3, 4
5. Any one of his Nieces. Inconveniences - - - -	2, 3, 4
6. Any one of his Sisters. Inconveniences - - - -	2, 4,
7. The descendants of his Wife. Inconveniences - -	1, 2, 3, 4
8. The Mother of his Wife. Inconvenience - - -	1
9. The Wife or Widow of any one of his descendants. Inconvenience - - - -	1
10. The Daughter of the Wife of his Father by a former husband, or of the husband of his Mother by a former wife. Inconvenience - - -	4'

Shall a man be permitted to marry the sister of his deceased wife?

There are reasons for and against. The condemnatory reason is the danger of rivalry during the life of the two sisters. The justifying reason is the advantage of the children. If the mother die, what a happiness for them to find a mother-in-law in their own aunt! What so likely to moderate the natural dislike to this connexion, as so near a relation? This last reason appears to me most weighty.

* The table of alliances to be prohibited to the woman would be necessary, in the text of the law, for greater clearness. It is omitted here as a useless repetition.

But in order to obviate the danger of rivalry, power ought to be given to the wife to interdict her house to her sister. If the wife do not wish to have her own sister near her, what legitimate motive can the husband have for admitting this stranger near to him?

Shall a man be permitted to marry the widow of his brother?

There are reasons for and against, in this as in the preceding case. The condemnatory reason is still the danger of rivalry. The justifying reason is still the advantage of the children. These reasons appear to me to have little force on either side.

My brother has no more authority over my wife than a stranger, and can only see her with my permission. The danger of rivalry appears less great upon his part than that of any other. The opposing reason is reduced almost to nothing. On the other side, what the children have to fear from a father-in-law is trifling. If a mother-in-law be not the enemy of the children of another bed, it is a prodigy; but a father-in-law is commonly their friend, their second guardian. The difference of the condition of the two sexes, the legal subjection of the one, the legal empire of the other, expose them to opposite foibles, which produce contrary effects. The uncle is already the natural friend of his nephews and nieces. They have nothing to gain in this respect if he become the husband of their mother. If they find in a strange father-in-law an enemy, the protection of their uncle is their resource. Do they find in him a friend? They have acquired another protector which they would not have done if their uncle had become their father-in-law. The reasons *for*, and the reasons *against*, having little force on the one side or the other, it seems that the benefit of liberty ought to cause the balance to incline in favour of permitting these marriages.

Instead of the reasons that are given above for prohibiting marriages within a certain degree of relationship, ordinary morality ploughs its way, and decides upon all these points of legislation without the trouble of examination. "These marriages," it says, "are repugnant to nature; therefore they ought to be proscribed."

This argument alone does not furnish a justifying reason, in sound logic, for forbidding any one action whatsoever. In those cases in which the repugnance is real, the law is useless. To what good purpose prohibit what no one wishes to do? The natural repugnance is a sufficient prohibition. But in those cases where the repugnance does not exist, the reason ceases. Ordinary morality has nothing further to say respecting the prohibition of the act in question, since all its argument, founded upon natural distaste, is destroyed by the opposite supposition. If it be proper to conform to nature, that is to say, to the inclination of the desires, it is proper equally to conform to its decisions, whatever they may be. If it be proper to prohibit these marriages when they are disliked, it is proper to permit them when they are approved. Nature deserves not more regard when it hates, than when it loves and desires.

It is very seldom that the passion of love developes itself within the circle of individuals among whom it ought properly to be prohibited: a certain degree of surprise seems necessary for exciting this sentiment, a sudden effect of novelty; and it is this which the poets have cleverly expressed by the ingenious allegory of the bow and arrows, and the blindfolding of Cupid. Individuals, accustomed to be seen and to be known from the age which is incapable of conceiving or inspiring desire, will be seen with the same eyes to the end of life — this inclination will find no determinate period for its commencement. The affections have taken another course; they are, so to speak, a river which has dug its own bed, and which cannot change it.

Nature therefore agrees sufficiently well with the principle of utility: still it is not proper to trust to it alone. There are circumstances which may give birth to the inclination, and in which the alliance might become an object of desire, if it were not prohibited by the laws, and branded by public opinion.

Among the Grecian dynasty of the Egyptian sovereigns, the heir to the throne commonly espoused one of his sisters. This was apparently to avoid the danger of an alliance with the family of a subject, or with the family of a stranger. In such a rank, such marriages may be exempt from the inconveniences attendant upon them in private life. Royal opulence admits a separation and a seclusion, which could not be maintained in a medium station.

Policy has produced some examples almost similar in modern times. In our days, the kingdom of Portugal has approximated to the Egyptian custom; the reigning queen has had for her husband her nephew and subject. But in order to efface the stain of incest, Catholic princes and nobles can apply to an experienced chemist, who changes at pleasure the colour of certain actions. Protestants, to whom this laboratory is shut, have not the faculty of marrying their aunts. The Lutherans have, however, given the example of an extension of privileges.

The inconveniences of these alliances are not felt by those who contract them: the evil is altogether in the example. A permission granted to one, makes every body else

feel the prohibition as tyrannical. Where the yoke is not the same for all, it appears more weighty to those who bear it.

It has been said, that these marriages into the same blood cause the race to degenerate, and that there is a necessity of crossing the race among men, as well as among animals. This objection might have some value, if under the empire of liberty, marriages among relations should become the most common. But it is enough to refute bad reasons; and even this would be too much, if a good cause were not served when the feeble and fallacious arguments by which it is sought to support it are destroyed. Some well-intentioned persons think that they ought not to take from good morals any of its supports, even when they are founded in falsehood. This error is related to that of the devotees, who have thought to serve the cause of religion by pious frauds: instead of strengthening, they have weakened it, by exposing it to the derision of its adversaries. When a depraved mind has triumphed over a false argument, it reckons that it has triumphed over morality itself.

§ 2. *For what period? Examination of Divorce.*

If the law had not determined any thing respecting the duration of the marriage contract; if individuals were permitted to form this engagement, like every other, for a longer or shorter term, — what would be the most common arrangement under the auspices of liberty? Would it be very different from the established rules?

The object of the man in this contract might be only to satisfy a transient passion, and this passion satisfied, he would have had all the advantage of the union without any of its inconveniences. It cannot be the same with the woman: this engagement has for her durable and burthensome consequences. After the inconveniences of pregnancy, after the perils of child-birth, she is charged with the cares of maternity. Hence the union, which confers upon the man pleasures only, is for the woman the commencement of a long circle of pains, whose inevitable termination would be death, if she were not beforehand assured of the cares and protection of a husband, both for herself and the germ which she ought to nourish in her bosom. "I give myself to you," she says to him, "but you shall be the guardian of my condition of weakness, and you shall provide for the preservation of the fruit of our love." Such is the beginning of a society which would be prolonged during many years, if we suppose the birth of only a single child; but other births would form other ties; in proportion as years advance, the engagement is prolonged; the limits which might have been first assigned will have disappeared, and a new career will have opened itself to the pleasures and reciprocal duties of the married persons.

When the mother can no longer hope for more children, when the father has provided for the support of the youngest of the family, will the engagement be dissolved? After a cohabitation of many years, will it be supposed that the married persons will separate? Habit will have entwined around their hearts a thousand and a thousand ties which death only could destroy. The children will form a new centre of union; they will create a new source of pleasures and hopes; they will render the father and mother necessary the one to the other, by the cares and charms of a common affection, which no one could share with them. The ordinary course of the conjugal union would therefore be for the duration of life; and if it is natural to suppose, in the woman, sufficient prudence thus to stipulate with respect to her dearest interests, ought less to be expected from a father or a guardian, who possesses more maturity of experience?

The woman has also a particular interest in the indefinite duration of the connexion: time, pregnancy, suckling, cohabitation itself, — all conspire to diminish the effect of her charms. She must expect to see her beauty decline, at a time when the strength of the man still goes on increasing: she knows, that after having spent her youth with one husband, she would with difficulty find a second; whilst the man would not experience a similar difficulty in finding a second wife. Hence this new clause, which foresight would dictate to her: "I give myself to you; you shall not leave me without my consent." The man demands the same promise; and hence, on both sides, a legitimate contract is founded upon the happiness of the two parties.

Marriage for life is therefore the most natural marriage; the best suited to the wants and circumstances of families; the most favourable for individuals, and for the generality of the species. If there were no laws to ordain it, that is to say, no other laws than those which sanction contracts, this arrangement would be always the most common, because it is that which is most suitable to the reciprocal interests of the persons marrying. Love on the part of the man, love and foresight on the part of the woman, all concur with enlightened prudence and affection on the part of parents, in impressing the character of perpetuity upon the contract of this alliance.

But what should we think if the woman should add this clause: "It shall not be lawful for me to be separated from you, should we come to hate each other as much as we now love one another." Such a condition

would appear to be an act of madness. It is something contradictory and absurd, which shocks at the first glance: every body would agree to regard such a vow as rash, and to think that humanity ought to cause it to be abolished.

But this cruel and absurd clause is not demanded by the woman, is not sought for by the man; it is imposed upon them both, as a condition from which they cannot escape. The law unexpectedly intervenes between the contracting parties: it surprises them in the transports of their youth, in the moments which open all the vistas of happiness. It says to them, "You unite yourselves in the hope of being happy, but I tell you that you enter into a prison, whose door will be closed against you. I shall be inexorable to the cries of your grief, and when you dash yourselves against your fetters, I shall not permit you to be delivered."

To believe in the perfection of the beloved object, to believe in the eternity of the passion which is felt, and which is inspired — such are the illusions which may be pardoned to two children in the blindness of love. But aged lawyers, legislators whose heads are whitened by years, ought not to give place to this chimera. If they believe in this eternity of these passions, to what good purpose interdict a power which no one would ever wish to use? But no: they have foreseen inconstancy, they have foreseen hatred; they have foreseen that the most violent love may be succeeded by the most violent antipathy, and it is with all the coolness of indifference that they have pronounced the eternity of this vow, even when the sentiment which has dictated it shall be effaced by the contrary feeling. If there were a law which permitted an associate, a guardian, a superintendent, a companion, only on condition of never separating from them, every one would exclaim against such tyranny and such folly. A husband is a companion, a guardian, a superintendent, a partner, and still more, all at once; and yet it is only possible in the greatest number of civilized countries to have eternal husbands.

To live under the constant authority of a man that one detests, is already a species of slavery: to be constrained to receive his embraces, is a misery too great to be tolerated even in slavery itself. It has been said, the yoke is reciprocal: — the reciprocity only doubles the misery.

If marriage commonly present to men the only means of fully and peaceably satisfying the imperious desires of love, to deter them from it, is to deprive them of its sweets, is to produce an evil proportionably great. But what greater bugbear can there be than the indissolubility of this contract? Marriage, service, country, whatsoever condition there is a prohibition against quitting — there is a prohibition against entering.

In conclusion, when death is the only means of deliverance, what horrible temptations, what crimes, may not result from a position so terrible? The unknown instances are perhaps more numerous than those which are known; but that which will most frequently take place in this respect, is the *negative offence*. When the crime is easy, even to hearts which are not perverted — when nothing more is necessary for its accomplishment than inaction — if a detested wife and an adored mistress are exposed to the same danger — will the same efforts be made, as sincerely, as generously, for the first as for the second?

It is not proper to dissimulate: there are objections against the dissolubility of marriages. We shall endeavour to collect and to answer them.

First Objection. — "Permit divorce, neither of the parties will regard their lot as irrevocably fixed. The husband will cast his eyes around him to find a wife who would be more advantageous: the woman would make similar comparisons, and form projects for changing her husband. Hence perpetual and reciprocal insecurity would result with respect to this precious kind of property, with regard to which the whole plan of life is arranged."

Answer 1. — This same inconvenience exists in part, under other names, when marriages are indissoluble. According to the supposition, reciprocal attachment is extinct. It is not a new wife that is sought, but a new mistress; it is not a second husband, but another lover. The duties of Hymen, and its prohibitions, too easily eluded, may perhaps serve to excite inconstancy rather than to prevent it. It is well known that prohibitions and constraint serve to stimulate the passions. It is a truth deduced from experience, that even obstacles, by occupying the imagination, by directing the mind to the same object, serve only to strengthen the desire of overcoming them. The reign of liberty produces less wandering fancies than that of conjugal captivity. Render marriages dissoluble, there will be more apparent, but there will be fewer real separations.

2. The inconveniences need not be considered alone: the advantages ought to be regarded also. Each one knowing what he was liable to lose, would cultivate those means of pleasing which originally produced the reciprocal affection. Each will more carefully study the other's character, and the means of managing it. Each will feel the necessity of making some sacrifices of caprice and self-love. In a word, care, attention, complaisance, will be continued in the married state; and that which was done only to obtain love, will be done to preserve it.

3. Marriageable young persons would be less frequently sacrificed by the avarice and cupidity of their relations. It would be necessary properly to consult their inclinations, before forming bonds which would be broken by repugnancies. The real suitability upon which happiness reposes — the relations of age, education, and taste — would then enter into the calculations of prudence. It would be no longer possible to marry the property, as has been said, without marrying the person. Before an establishment were formed, there would be an examination whether it would be durable.

Second Objection. — "Each party regarding the connexion as transitory, would only espouse with indifference the interests, and especially the pecuniary interests of the other. Hence would arise profusion, negligence, and every species of bad management."

Answer. — The same danger exists in commercial partnerships, and yet the danger is very rarely realized. A dissoluble marriage has a bond which these partnerships have not, the strongest, the most durable of all moral ties: affection for their common children, which cements the reciprocal affection of married persons. Among indissoluble marriages, is not this bad management more frequently found than in commercial partnerships? Why? It is an effect of the indifference and distaste which give to married persons, who are tired of each other, a continual desire to escape from themselves, and to seek for new distractions. The moral tie of their children is dissolved; their education, the care of their future welfare, is scarcely a secondary object; the charm of their common interest has vanished; each one, in the pursuit of his own pleasures, troubles himself but little with what will happen after him. Hence, a principle of disunion among married persons introduces negligence and disorder, by a thousand channels, into their domestic affairs; and the ruin of their fortune is often an immediate consequence of the estrangement of their hearts. Under the reign of liberty, this evil would not exist. Before there was a disunion of interests, disgust would have separated the persons.

The facility of divorce tends rather to prevent than to give birth to prodigality. It would produce a dread of giving so legitimate a reason for discontent to an associate whose esteem it is desirable to conciliate. Economy, appreciated at its full value by the interested prudence of both parties, would always have so much merit in their eyes as would cover many faults, and in its favour they would pardon many wrongs. It must also be perceived, that in case of a divorce, that one of the two parties who shall have the character of having behaved ill, and been extravagant, would have much less chance of forming other more advantageous connexions.

Third Objection. — "The dissolubility of marriage will give the stronger of the two parties an inclination to maltreat the feebler, for the purpose of constraining its consent to the divorce."

Answer. — This objection is well founded; it deserves the greatest attention on the part of the legislator. A single precaution, however, is happily sufficient to diminish the danger: in case of maltreatment, liberty to the party maltreated and not to the other. In this case, the more a husband desired a divorce for the purpose of marrying again, the more he would avoid behaving ill towards his wife, for fear lest certain acts should be construed as acts of violence intended to constrain her consent. Gross and brutal methods being forbidden, there remain only gentle methods of engaging her to a separation.

Fourth Objection. — This is drawn from the interest of the children. "What will they do when the law has dissolved the union between the father and the mother?"

Answer. — That which they would have done if death had dissolved it. But in the case of divorce, their disadvantage is not so great: the children may continue to live with the parent whose cares are most necessary for them; for the law, consulting their interest, would not fail to entrust the boys to the father, and the daughters to the mother. The great danger to which children are exposed after the death of a parent, is that of passing under the government of a father or mother-in-law, who shall look upon them with the eyes of an enemy. Daughters especially are exposed to the most vexatious treatment under the habitual despotism of a stepmother. In the case of a divorce this danger does not exist. The boys will have their father for their governor, and the daughters will have their mother. Their education will suffer less than it would have suffered from their domestic strifes and quarrels. If, then, the interest of the children were a sufficient reason for prohibiting second marriages in case of a divorce, it is a still stronger reason for prohibiting them in case of death.

In conclusion, the dissolution of a marriage is an act sufficiently important to be submitted to some formalities, which would at least have the effect of preventing caprice, and allowing the two parties time for reflection. The intervention of a magistrate is necessary, not only for proving that there has been no violence on the part of the man in forcing the consent of the wife, but also for the purpose of interposing a greater or less delay between the demand for a divorce and the divorce itself.

This is one of those questions upon which opinions will be always divided. Every one will be led to approve or condemn divorce according to the good or evil which he has seen resulting from particular cases, or according to his particular interest.

In England, a marriage may be dissolved in case of adultery. But it is necessary to seek for a divorce through many tribunals; and an act of parliament upon this subject costs at least five hundred pounds sterling. Divorce is therefore accessible only to a very limited class.

In Scotland, adultery is a sufficient ground for a divorce. The law is mild in this respect, but it has a rigorous side: it does not permit the culpable party to contract another marriage with the accomplice of his guilt.

In Sweden, divorce is permitted for adultery on both sides: this amounts to the same as if it were permitted upon mutual consent; the man allows himself to be accused of adultery, and the marriage is dissolved. In Denmark, the law is the same, at least when collusion cannot be proved.

Under the Code Frederick, parties might separate by agreement, and afterwards be remarried, upon condition of remaining single a whole year. It would seem that this interval, or a part of this interval, would have been better employed in delay before granting the divorce.

At Geneva, adultery was a sufficient reason; but the separation might also be effected on account of simple incompatibility of character. A woman, by quitting the house of her husband, and retiring to that of her friends and relations, afforded grounds for a demand, which had always the legal effect of a divorce. Divorces were, however, rare; but as they were proclaimed in all the churches, this proclamation acted as a species of punishment or public censure, which was always dreaded.

When marriages were rendered dissoluble in France at the will of the parties, there were between five and six hundred divorces at Paris in two years; but these took place whilst the institution was new, and when, therefore, it would not be possible to judge of its usual operation.

Divorces are not common in those countries in which they have been long authorized. The same reasons which hinder legislators from permitting them, deter individuals from availing themselves of them when they are permitted. The government which interdicts them, takes upon itself to decide, that it understands the interests of individuals better than they do themselves. The effect of the law is evil or null.

In all civilized countries, the woman who has experienced ill-treatment on the part of her husband, has obtained from the tribunals what is called a *separation*. There does not result from this, permission to either of the parties to re-marry. The ascetic principle, the enemy of pleasure, has permitted the mitigation of punishment; but the injured wife and her tyrant are subjected to the same condition. This apparent equality covers great real inequality. Opinion allows great liberty to the stronger sex, but imposes great restraint upon the weaker one.

§ 3. *On what Conditions?*

The only inquiry at present is, what are the matrimonial conditions which, according to the principle of utility, are suitable to the greatest number: for it ought to be lawful for the parties interested in these contracts, to make their own particular stipulations; in other words, the conditions ought to be left to their own will, saving the ordinary exceptions:—

First Condition.—"The wife should submit to the laws of the husband, saving recourse to justice." Master of the wife as to what regards his own interests, he ought to be guardian of the wife as to what regards her interests. Between the wishes of two persons who pass their life together, there may at every moment be a contradiction. The benefit of peace renders it desirable that a pre-eminence should be established, which should prevent or terminate these contests. But why is the man to be the governor? Because he is the stronger. In his hands power sustains itself. Place the authority in the hands of the wife, every moment will be marked by revolt on the part of the husband. This is not the only reason: it is also probable that the husband, by the course of his life, possesses more experience, greater aptitude for business, greater powers of application. In these respects there are exceptions; but the question is, what ought to be the general law?

I have said, "*saving recourse to justice;*" for it is not proper to make the man a tyrant, and to reduce to a state of passive slavery the sex which, by its weakness and its gentleness, has the greatest need of protection. The interests of females have too often been neglected. At Rome, the laws of marriage were only the code of the strongest, and the shares were divided by the lion. But those who, from some vague notion of justice and of generosity, would bestow upon females an absolute equality, would only spread a dangerous snare for them. To set them free, as much as it is possible for the laws so to do, from the necessity of pleasing their husbands, would be, in a moral point of view, to weaken instead of strengthen their empire. The man, secure of his prerogative, has no uneasiness arising from his self-love, and derives enjoyment even from sacrificing it.

Substitute to this relation a rivalry of powers, the pride of the strongest would be continually wounded, and would prove a dangerous antagonist for the more feeble; and placing a greater value upon what was taken, than upon what was still possessed, it would direct all its efforts to the re-establishment of its pre-eminence.

Second Condition.—"The administration should belong to the man alone." This is a natural and immediate consequence of his empire. Besides, it is commonly by his labour that the property is acquired.

Third Condition.—"The right of enjoyment should be in common." This condition is admitted; 1*st*, For the benefit of equality. 2*d*, In order to give to both parties the same degree of interest in the domestic prosperity: but this right is necessarily modified by the fundamental law, which subjects the wife to the authority of the husband.

The diversity of conditions, and the nature of property, would require many details on the part of the legislator. But this is not the place for stating them.

Fourth Condition.—"The wife shall observe conjugal fidelity." The reasons which direct that adultery should be considered as a crime, need not be exposed here; they belong properly to the penal code.

Fifth Condition.—"The husband shall observe similar conjugal fidelity." The reasons for considering the adultery of the husband as criminal will also belong to the penal code: they have less weight, but there are still sufficient reasons for establishing this legal condition.

§ 4. *At what Age?*

At what age should it be lawful to marry? It ought not to be before the age at which the contracting parties can be considered capable of understanding the value of this engagement; and more regard should be paid to this particular, in those countries in which marriages are considered indissoluble. How many are the precautions which ought to be taken, in order to prevent a rash engagement, when repentance would be useless! The right ought not, in this case, to have a period anterior to that at which the individual enters upon the administration of his property. It would be absurd that a man should be able to dispose of himself for ever, at an age at which it is not lawful for him to sell a field of the value of ten crowns.

§ 5. *Who shall choose?*

Upon whom shall the choice of a husband or a wife depend? This question presents an apparent, if not a real absurdity; as if such a choice could belong to any other than the party interested.

The laws ought never to entrust this power to the parents;—they want two things requisite for its beneficial exercise, the requisite knowledge, and a will directed to the right end. The manner in which parents and children see and feel, is not the same; they have not the same interests. Love is the moving principle of youth; the old scarcely feel it. Fortune, in general, is a feeble consideration among children; it is an important one with parents. What the child wishes, is to be happy; what the parent wishes, is that he may also appear to be so. The child would sacrifice every thing for love; but the parents would often sacrifice this interest to every other.

To receive into their family a son-in-law, or a daughter-in-law, whom they dislike, is a disagreeable circumstance; but is it not much more cruel for the children to be deprived of the husband or the wife which would make them happy? Compare the sufferings on both sides. Is there any equality? Compare the probable duration of the life of the parent and the child: see if you ought to sacrifice that which is just commencing, to that which is drawing to a close. Thus much for the simple right to prevent. What shall be said if, under the mask of a parent, an unpitying tyrant should seek to abuse the gentleness and timidity of his child, in order to compel a union with a person that was detested?

The connexions of children depend greatly upon those of their parents. This is partly true as respects the sons, and entirely as respects the daughters. If the parents neglect to use this right; if they do not strive to direct the inclinations of their family; if they leave the choice of their acquaintances to chance,—to whom are the imprudences of their youth to be ascribed? In conclusion, in taking from them the right to bind or to compel, it is not necessary to take from them that of modifying and retarding. Two periods may be distinguished in the marriageable age: During the first, want of consent on the part of the parents ought to suffice for annulling the marriage. During the second, they should still have the right to retard for some months the completion of the contract. This time should be given them, that they might make use of their advice.

There exists a custom sufficiently singular in one country in Europe renowned for the wisdom of its institutions: The consent of the parents is necessary to the marriage of minors, unless the lovers can travel a hundred leagues without being stopped. But if they have the good fortune to cross a small stream, ascend a slight hill, and reach a certain village, they may in a moment pronounce the nuptial vow before the first comer, though he ask them no question—and the marriage is valid, and the parental authority is over-

thrown. Is it for the encouragement of adventurers that a privilege of this kind is allowed to subsist? Is it from a secret desire to weaken the power of parents, or to favour what are otherwise called *unequal matches?*

§ 6. *How many contracting Parties?*

Between how many persons ought this contract to subsist at one time?—in other words, ought polygamy to be tolerated?—Polygamy is either simple or double. It is simple where there is *Polygynia*, a multiplicity of wives; or *Polyandria*, a multiplicity of husbands.

Is polygynia useful or hurtful? Every thing which it has been possible to say in its favour, has only related to certain particular cases, to certain transitory circumstances: when a man, by the sickness of his wife, is deprived of the sweets of marriage, or when, by his profession, he is obliged to divide his time between two residences, as the commander of a vessel, &c.

That such an arrangement may sometimes be desirable to the man, is possible; but it never can be so to the wives. For every man there would always be two wives, whose interest would be sacrificed.

1. The effect of such a license would be to aggravate the inequality of conditions. The superiority of wealth has already too great an ascendancy, and this institution would make it still greater. A rich man, forming an alliance with a woman without fortune, would take advantage of her position to prevent his having a rival. Each of his wives would find herself in possession only of the moiety of a husband, whilst she might have constituted a source of happiness to another man, who, in consequence of this iniquitous arrangement, would be deprived of a companion.

2. What would become of the peace of families? The jealousies of the rival wives would spread among the children. They would form opposed parties, little armies, having each at their head an equally powerful protectrix, at least, with respect to her rights. What a scene of contentions! what fury! what animosity! From the relaxation of the fraternal bonds, there would result a similar relaxation of filial respect. Each child would behold in his father a protector of his enemy. All his actions of kindness or severity, being interpreted by opposite prejudices, would be attributed to unjust feelings of hatred or affection. The education of the children would be ruined in the midst of these hostile passions, under a system of favour or oppression, which would corrupt the one party by its rigours, and the other by its indulgences. In the East, polygamy and peace are found united, but it is slavery which prevents discord: one abuse palliates another; every thing is tranquil under the same yoke.

There results from it an increase of authority to the husband: what eagerness to satisfy him! what pleasure in supplanting a rival by an action which is likely to please him! Would this be an evil or a good? Those who, from a low opinion of women, imagine that they cannot be too submissive, ought to consider polygamy admirable. Those who think that the ascendancy of this sex is favourable to suavity of manners—that it augments the pleasures of society—that the gentle and persuasive authority of women is salutary in a family—ought to consider this institution as very mischievous.

There is no need of seriously discussing polyandria, nor double polygamy. Perhaps too much has been said upon this first subject, if it were not well to show the true foundations upon which manners are seated.

§ 7. *With what Formalities?*

The formalities of this contract ought to refer to two objects: 1*st*, To ascertain the fact of the free consent of the two parties, and of the lawfulness of their union; 2*dly*, To notify and ascertain the celebration of the marriage for the future. It would also be proper to exhibit to both the contracting powers the rights they are about to acquire, and the obligations with which they will be chargeable according to law.

Most nations have attached a great solemnity to this act; and it is not to be doubted but that ceremonies which strike the imagination, serve to impress the mind with the importance and dignity of the contract.

In Scotland, the law, much too easy, does not require any formality. The reciprocal declaration of the man and the woman, in the presence of a witness, is sufficient to render a marriage valid. Hence it is to a village upon the frontier of Scotland, named *Gretna Green*, that minors, impatient of the yoke of their parents or guardians, hasten to emancipate themselves by an off-hand marriage.

In instituting these forms, two dangers ought to be avoided: 1*st*, The rendering them so embarrassing as to prevent a marriage, when neither freedom of consent nor the necessary knowledge are wanting; 2*dly*, The giving to the persons who ought to concur the power of abusing this right, and of employing it to a bad purpose.

In many countries, it is necessary to tarry long in the vestibule of the temple before advancing to the altar, under the title of *affiances:* the chains of the engagement are borne, without its advantages. What purpose does this work of supererogation answer, except the multiplication of embarrassments and snares? The Code Frederick is justly

chargeable, in this respect, with useless restraints. The English law, on the contrary, has, on this occasion, chosen the part of simplicity and clearness: every one knows to what he is bound: a man is either married, or he is not.

APPENDIX.

OF THE LEVELLING SYSTEM.*

"ALL human creatures are born and remain," says the Declaration of Rights, "equal in rights." It has hence been argued, that they ought to be equal in property; and that all the distinctions which have grown up in society in this respect, should be swept away, and every individual placed on the same level in point of actual possessions.

Such a system would, however, be destructive both of security and wealth. It would be destructive of security. What a man has inherited from his ancestors — what he has himself earned, he hopes to keep; and this hope cannot be interrupted without producing a pain of disappointment. But if, of two persons, the one is to take from the other a portion of the property he possesses to-day, because he is the poorer; for the same reason, a third should take a portion of such property from both to-morrow, as being poorer than either; and so on, till all security in the possession of property — all hope of retaining it, were altogether abolished.

As no man could, at this rate, be secure of enjoying any thing for two moments together, no man would give himself the trouble to improve any thing by his labour: all men would live from hand to mouth.

While the levelling process is going on, it is destructive to security; when completed, it is destructive, and that for ever, of national opulence. The wealth of a nation is the sum of the fortunes of individuals; but the sum of the fortunes of individuals is reduced by the levelling system in an infinity of ways. Whatever be the quantum of wealth allowed of, to reduce fortunes to this standard the community must be emptied of all articles of wealth, which cannot exist but in a quantum superior to that standard.

The English nation is, for a nation of any considerable size, generally acknowledged to be the richest, in proportion to the number of the people, of any nation under the sun. But in this richest nation, those who have reckoned its wealth at the highest, have not set down the annual expenditure of its inhabitants, taking even the very richest into the account, at more than £20 a-year each. If, then, the whole wealth of the nation were divided with the most perfect equality among its inhabitants; and were all of it capable of being thus divided, it would scarcely be more than sufficient to enable every one of them, so long as the stock of it was kept up at the same level, to spend more than £20 a-year. But were such a distribution to be made, an immense multitude of articles — wealth to an immense amount — must necessarily be struck out, as being incapable of division, and thence incapable of entering into the distribution. At 30 years' purchase, a perpetual income of £20 a-year corresponds to a capital or principal sum of £600. All articles, therefore, of a value superior to £600, must either be destroyed at once, or left to perish, sooner or later, for want of being kept up; that is, kept in repair, and properly taken care of.

The following, then, are the articles to the existence of which the system in question would be fatal; and that not only in the first instance, but for ever after during its continuance; and of which the aggregate value must therefore be struck out of the aggregate amount of the national wealth.

1. All buildings above the mark; that is, all that would now be thought to come under the name of considerable buildings — all considerable dwelling-houses, warehouses, manufactories.

2. All furniture, except what is now of the meanest kind — all furniture suitable to the circumstances of a family having more than £20 a-year a-head to live on.

3. All horses, except a few of those at present kept for husbandry. No one nor two in a family could afford to keep a horse, since the expense of that article alone would exceed the family income. All horses fit for military service; consequently, a great part of the manure which is supplied by that valuable species of cattle would be lost. In the earliest, and what are vulgarly called the purest times of the Roman Commonwealth, those whose wealth enabled them to serve on horseback formed an order of men, distinct from and superior to those who served on foot. A commonwealth that admitted of such distinctions, could never be tolerated under this system of equalisation.

4. All considerable libraries. All libraries

* The following Essay is edited from the MSS. of Bentham.

the value of which depended upon their completeness in regard to any particular branch of literature, and of which the characteristic value would be destroyed by the degree of dispersion which the execution of the equalisation plan would necessitate.

5. All considerable collections of natural history; and hence all means of prosecuting that branch of study to advantage would cease.

6. All considerable laboratories and establishments for the prosecution of experimental inquiries with a view to the advancement of agriculture, manufactures, or arts. Hence all means of promoting the advancement, or even preventing the decay of experimental science, would cease.

7. All fortunes capable of affording funds sufficient for the purchase of the constant supply of publications relative to any branch of knowledge at the rate of abundance at which the literary market is supplied with these productions in the present state of things.

8. All fortunes capable of affording funds applicable to the improvement of land, mines, or fisheries, upon an extensive and advantageous scale.

9. All fortunes capable of affording, at an early period of life, a fund in store sufficient for the maintenance of the numbers of children of which the marriage union may in every instance, and in many instances will eventually be productive.

10. The whole value of the labours of those whose industry is at present employed in supplying the productions adapted to the demands of persons in easy circumstances — of all those at present employed as workmen in the different branches of the arts, and of the finer manufactures — all musicians, architects, painters, sculptors, engravers, carvers, gilders, embroiderers, weavers of fine stuffs, florists, and the like. All these, finding nobody rich enough to deal with them, must immediately betake themselves to husbandry or other coarse labour, which their habits of life have disqualified them from exercising to any advantage.

11. The whole of that property which consists in annuities payable by government out of the produce of taxes imposed on the fruits of industry. As those taxes are imposed almost exclusively on superfluities, and all superfluities will be expunged from the book of national wealth, national bankruptcy will be among the necessary and immediate consequences of such a change.

12. Whether it be of advantage or of detriment to the state, or a matter of indifference, that small farms should be laid into large ones, is a controverted point, upon which it is not necessary here to touch. But what can not admit of controversy is, that in a multitude of instances, farms, large or small, would suffer much in value by being broken down into smaller ones. A spring or pond, a convenient communication with the highway or bridge, serves at present for the whole of a farm: divide this farm among a number of proprietors, and only a small part of the original farm, or perhaps no part at all, will now derive any benefit from that conveniency, which before the division was enjoyed by the whole. A certain portion of land fit for one sort of culture, requires certain other portions of land fit for other sorts of culture, to be employed with most advantage; — to so much arable, so much wood, so much meadow land. Under the division, one man has wherewithal to buy the meadow land only, another the wood-land only, and the arable must be divided into several little plots, to come within the quantum of purchase-money which the equalisation plan allows. There are fields, each of them too large for any one purchaser, and which, without new inclosures correspondent to the number of the purchasers, must lose the benefit of inclosure. But the purchaser's capital is all of it expended in the purchase: he has nothing, no fund left for the expenses of inclosure. One house, one set of outhouses, serves for the whole of the farm in its undivided state. Divide it into the £20 a-year portions, he who gets the dwelling-house is perhaps unable to get the outhouses; if he get the house and outhouses, he perhaps is unable to get any of the land; if he get a small scrap of the land, and it can be but a small one, none of the other fragments of farms carved out of the entire farm has any building belonging to it. But without buildings, they will be worth little or nothing; and as to erecting the buildings, it is impossible: what capital each man had, is expended in the purchase of the naked land. But as every man must have a house to live in, and every man who cultivates a farm must have outhouses of some kind or other to lodge the stock and produce of it, a fund for these articles of indispensable necessity must be provided in the first instance, and the fragments of farms must consequently be reduced to the miserable and unproductive pittance, the annual value of which corresponds to the small remnant of capital that remains to buy them. Thus great is the part of the existing mass of wealth which would therefore be destroyed by the division, as being in its own nature incapable of division. But of that which remained, as not being in its own nature incapable of division, a great part again would be consumed in the process. The whole mass of national property would have to come under the hammer; and every time either the sale of an estate or a division of the produce of the sale came to be made, every sale

and every distribution would afford a fresh source of disputes between the plundered and the plundered, between plunderers and plunderers, and between plunderers and plundered, and a fresh demand for the labours, and a fresh harvest for the men of law. Auctioneers with their retainers are already, in the present system of things, in no small number; men of law in greater number than most people would wish to see. On the system in question, the populousness of these predatory professions would be multiplied beyond all measure. An effective tithe of the national property, not to speak of a nominal tithe like the present ecclesiastical one, would scarcely be sufficient for the payment of this enormous mass of unproductive and disastrous services.

Present time, it may be said, is but a point: it is as nothing in comparison with futurity. Admitting that the existing generation might, upon the whole, be losers by such a change, those whose ardent zeal would prompt them to attempt it, may still think, or affect to think, the change an advantageous one for the human species upon the whole. But futurity would have as little reason to rejoice in it as present time.

Opulence is valuable, not merely on its own account, but as a security for subsistence. The rich, were they to deserve proscription because of their riches, deserve to be saved from proscription in quality of bankers to the poor. Estates broken down to the scantling in question, or to any thing like that scantling, would afford no resource against scarcity, or any other calamity, such as fire, famine, or pestilence, that required a considerable treasure in store to be employed to alleviate the load of it. They would afford no fund for the expenses of a war, even of a defensive one.

Along with the whole stock of opulence, would go that branch of security which depends upon the means of national defence. In war, the measure of raising within the year supplies for the service of the year—desirable as such a measure would in the opinion of every one be, if it were practicable, has always been given up as attended with too much difficulty and even danger, to be attempted; and this even in the present state of opulence, when the number of those capable of contributing, and contributing largely, is so great. How would it be when those who were best able to contribute had but £20 a-year to live on? It is now looked upon as impracticable: then it would be beyond measure more so, even though every man had his £20 a-year; much more when that pittance is reduced to perhaps two-thirds, perhaps half, by the various causes of reduction which would be in operation. At the same time, to raise the supplies otherwise than within the year, would be still more palpably impracticable; it would be physically impossible. At present, if so many millions are raised with so much ease within the year by way of loan, it is because there are so many thousands of persons who have each so many thousands of pounds to lend, so many thousands more than they have need to employ otherwise. Upon the equalisation scheme, all these monied men would be no more: nobody would have any thing he could spare for any length of time, much less for ever; no man would have any thing but from hand to mouth.

As to the gainers—(I speak always of the immediate and momentary gainers, for ultimately, as we shall see, there would scarcely be a real gainer left in the nation)—as to the real gainers, if they were to be looked for any where, it would be in the class of the present day-labourers in husbandry. Their employment need not be changed: they would continue labourers in husbandry, with this comfortable difference, as it would be thought, of labouring upon, and for the benefit of their own property, instead of other people's. But even these would for the most part gain nothing but ruin by the change. Their fragments of farms having no buildings on them, would be useless to them till buildings could be erected. A man might farm profitably, and live comfortably a year or two hence, if he were then alive: but in the meantime he would not be able to farm or live at all. The immense multitude of new created farms, all of them without buildings, would require an immense and instant multiplication of the number of workmen concerned in building. But this number, instead of being multiplied, or so much as increased, would be as immediately and permanently reduced: for they too would have their portions, as well as the labourers in husbandry: if they laboured any longer, it would be upon their own property, not upon other people's. If they laboured at all, what inducement would they have to labour upon other people's property, or indeed for other people? What would they get by it? an addition to their respective portions? But that, by the supposition is not to be suffered. No sooner was it become property, than it would come to be divided: no sooner had they got it, than it would be taken from them.

This supposes every body day-labourers and mechanics devoted to industry, disposed to frugality, proof against all temptation to excess, even in the midst of a sudden and unexpected influx of the momentary means of excess and dissipation. But even in the present system of things, this extraordinary degree of moderation is, under such circumstances, hardly to be expected from one in ten among those classes; and under the pro-

posed new system, industry and frugality would be but folly, as we shall presently have occasion to observe.

Who would be the losers — I mean the immediate losers — by such a change? Those, and at first sight it might seem those only, whose present fortunes are above the mark. But these would be but a small part of the real and effective losers. To the list of present proprietors must be added that of all those sons of industry whose present annual earnings are to a certain amount superior in value to the intended common portion; — all professional men in any tolerable practice — physicians, surgeons, lawyers, artists, factors, and the like; — many handicrafts of the superior kind, such as mathematical-instrument makers, millwrights, shipwrights, musical-instrument makers, &c.; and even mere labourers, where the labour is severe, as coal-heavers, &c. earn from £50 to £200 a-year, which the greater part of them are in the habit of spending as it comes. What would be either their present feelings, or even their future advantage, on changing their £50 or £200 a-year for life into a perpetuity even of £20 a-year, supposing the common portion could amount to so much, instead of falling widely short of that mark, as it will soon be seen to do?

Equalisation laws, made at the expense of existing rights and expectations, are alike destructive to present security in respect to property, and to permanent security in respect of subsistence. The desire to establish such laws, or to cause them to be established — the love, the passion for equality, has its root, not in virtue, but in vice; not in benevolence, but in malevolence.

A law of this complexion is a mere act of robbery — but of robbery upon a large scale. In the nature and quality of its effects, it is undistinguishable from the crime that goes by that name; but in point of extent, the mischief of it is as much greater as the power of the government is greater than that of the private robber. The power of the ordinary robber goes not beyond a few moveables; and such moveables as may easily and speedily be conveyed away: the power of the legislating robber extends to immoveables — to every thing — to the future as well as to the present. The power of the ordinary robber extends not beyond the few whom chance may throw in his way: the power of the authorised robber extends over the whole territory of the state.

The passion for equality has no root in the benevolent affections: its root is either simply in the selfish affections, or in the selfish, combined with the malevolent. You being superior to me in wealth or power; my wish is that we may be equal. What is the object of that wish? in what possible way can it have its gratification? In one or other, and only in one or other of two ways: either by raising myself to your level, or by pulling you down to mine. If it be the first only that is in my thoughts, self-interest, and that only, is my ruling motive: if the first and the second, envy conjoined with selfishness are the passions that govern me. The man of benevolence is the man to whom the spectacle of another's happiness is delightful. The lover of equality, in its most refined form, is the man to whose eyes the spectacle of another's prosperity is intolerable. What is the envious man but the same? What, then, is this so much boasted passion for equality? It is a propensity which begins in vice and leads to ruin. In the scale of merit, it is as much below selfishness as selfishness is below the virtue of benevolence.

Equality, were it brought to the highest pitch of perfection to which the hearts of the most sanguine votaries of the equalisation plan could wish to carry it, would still be but the semblance of equality in effect. If equality in point of wealth be desirable, it can only be so in the quality of an efficient cause of equality in point of happiness: at least in as far as the quantum of happiness depends on that of wealth. But of equality in point of wealth, nothing like equality in point of happiness can be the result: not even in so far as happiness depends on wealth. Equality in point of wealth, is equality in point of *means* of happiness: but what does equality of means, in favour of happiness, where equality in point of wants is wanting? The allotments in point of wealth, to be productive of equality in point of happiness, must be not equal, but proportional; not equal to one another, but all of them proportioned to men's respective wants. It is only from proportionality, not from equality in point of wealth, that equality in point of happiness can arise. Where is the equality between me and my robust and healthy neighbour, if I am dying for want of that relief in the way of medicine, sea-bathing, or change of air, which a portion of his allotment out of the estate that was all of it mine, but is now shared with him and others, would have enabled me to procure?

Inequality is the natural condition of mankind. Subjection is the natural state of man. It is the state into which he is born: it is the state in which he always has been born, and always will be, so long as man is man: it is the state in which he must continue for some of the first years of his life, on pain of perishing. Absolute equality is absolutely impossible. Absolute liberty is directly repugnant to the existence of every kind of government.

All human creatures are born and remain, says the declaration of rights, equal in rights.

The child of two years old has as much right to govern the father, then, as the father has to govern the child.

Without the subjection of either the wife to her husband, or the husband to the wife, no domestic society as between man and wife could subsist. Without the subjection of the children to the parent, no domestic society, as between parent and child, could subsist: all children under a certain age must soon perish, and the species become extinct. But the persons thus placed under subjection by non-age, are at least half of the species, and those placed in a similar state by marriage not less than a third of the remaining half. Subjection, then, is the natural and unavoidable state of at least two-thirds of the species; and if it were possible that any thing like independence could subsist among any part of it, it could only be among the remaining third.

As the doctrine of universal independence is repugnant to possibility and the nature of things, so is the doctrine of universal equality absolutely repugnant to the existence of general independence, in as far as independence is possible. Those who are exempt from domestic subjection, can in no intelligible sense be said to be equal in point of rights to those who are under it. If universal equality, then, were the object that ought to be in view, universal subjection, as strict as domestic subjection, would be the only means of obtaining it. Universal equality by independence you cannot possibly have: equality as universal as you please, by subjection as universal as you please, you may have, if you desire to have it, with one exception only, that of the monarch.

The great point is to get any government at all: it is the most useful point, and the most difficult. When once you have got your government, and got it tolerably settled, then is the time to temper it.

But why combat shadows, it may be said, and expatiate upon a scheme of equalisation which you are representing as impracticable? It is only for equality, so far, and so far only as it is practicable, and practicable to advantage, that we contend: for the lopping off the superfluities of overgrown and excessive opulence, for alleviating the sufferings of excessive misery: for planting and maintaining the virtuous race of industrious proprietors, for planting and maintaining plenty without luxury, and independence without insolence. To push any system to an absurd excess, and then give the abuse of the system as the system itself—what can be more uncandid or more inconclusive? Your objections would be just enough if applied to the abuse of the system proposed, but have no force against a moderate and prudent application of it.

My answer is, that it admits not of any moderate or prudent application: that the principle admits not of your stopping anywhere in the application of it: that on pain of abandoning and passing condemnation on the principle, when once the process of forced equalisation is begun, it must go on and be pursued all lengths, even to the lengths that have been described: that the principles publicly avowed by the professed partisans of equality, go all these lengths in the very words, as well as according to the spirit of their most public and most boasted productions: that the doctrine of equal rights is laid down without reserve: that no line is drawn, or attempted to be drawn; that the words employed exclude the drawing of any such line; and that if any line had been drawn, or were to be attempted to be drawn, the attempt would not so much as palliate, much less remedy the evil: and that to the imputation of error it would only add the reproach of inconsistency and dereliction of principle.

To stop at any one point in the career of forced equalisation, would neither afford security to such of the rich as it left unplundered, nor satisfaction to the poor whom it left unenriched. An object being avowed, which can never be attained so long as I have a penny more than the beggar that plies before my door, what assurance can I give myself any day (says the rich man, who hath as yet been spared), that it may not be my turn the next? Will the vagabonds that have as yet got no share, be satisfied with the plunder that has fallen to the lot of their brother vagabonds that are consuming theirs? Where is the justice, where the equality of this pretended equalisation plan? cries the expectant beggar, whom the division has not yet reached. Why have my wants been so long neglected, while those of my neighbour have been so long satisfied? Am I less a citizen than he? is my happiness less a part of the happiness of the community than his? So far from gaining by the change, I am as yet a loser by it. Till now, only the few, now the many, are above me. Till now, my superiors were out of my sight; now they are incessantly at my elbow. Till now, my superiors were all strangers to me; now my equals, my familiars, swell the list. Not a step can I stir without falling in with an acquaintance, revelling in enjoyments, of which, it seems, I am destined never to partake.

As these discontents will arise at every step made in the progress, so will they at every other that can be made, and always with equal reason—or rather with superior and accumulating reason. Every preceding step will have afforded a precedent, and the commencement of a justification of the succeeding ones: what at first was theory, will have been settled into practice: what at first was innovation, will have become establish-

ment: till at length the original race of proprietors having been reduced to nothing, and all hope or possibility of repairing an injustice done to them being annihilated, the opposition made by justice will have ceased: justice will have become indifferent, and as it were neutral: the injustice of going on will not be exceeded by the injustice of stopping. Name who can the point at which the line of stoppage can be drawn. No such line hath as yet been drawn by any man; no such line attempted to be drawn by any man. Let arbitrary power have decreed (and what but power the most arbitrary could decree) that a line of this sort shall be drawn; that bounds of this sort shall be set to the process of equalisation, — what but caprice can draw it? what but corruption will be said or will be thought to have set them?

The argument that turns on the difficulty of stopping is a common one: it is become commonplace: it is open to abuse, and few have been more abused: it has been employed against salutary measures: and the more frequently and the more eagerly employed, as it is one of those general arguments which may be produced against measures which admit of no particular objections. It is more to the taste of the ignorant fool, and of the cowardly, than of the knowing or the brave: it is more apt to be employed in the defence of old abuses, than in the combating of novelties really pernicious.

It is one of those objections that is much better calculated to confirm partisans already gained, than to gain new ones; still more than to make proselytes from partisans engaged on the other side. To say to me (after admitting that as yet I am in a right track,) to say to me, you will find it impossible or difficult to stop, is to say to me, either prudence or fortune will be wanting to you: it is to say to me, that will happen which you are persuaded will not happen. It is to gall, in a multitude of tender points at once, the irritable frame of human vanity. It is to turn a disbelieving ear to my pretensions of present judgment and present forecast; it is to prophesy to me and my friends, a future deficiency in point of prudence and good fortune.

In the present instance, the argument wears a very different complexion, and strikes with a very different degree of force. It is — not that you will find it difficult to stop at a proper place, but that you ought not to stop anywhere: it is — not that you may be drawn on into the road to ruin, but that you can not, in the nature of things, so long as you pursue your intent, stop anywhere short of ruin: it is — not that you may be led on by heat of temper or untoward accidents beyond the bounds which the principle you set out upon has prescribed to you, but that you can not stop anywhere short of ruin without the dereliction of your principle; without a confession by action, more humiliating than any confession by words, that your whole system was from the first, on the whole, and in every part of it, a pernicious one, and the most pernicious of all political systems that ever were or can be devised. Not only the good expected from such a change would be too expensive, but were it ever so desirable, it would be altogether unattainable — at least unmaintainable for two instants together. Past equality does not answer the intention — present equality is the object; and whatever reason there may be for aiming at it at any one period of time, the same reason will there be for maintaining it at every other period of time. A fresh division must therefore be made upon every division that happened in the number of the sharers: a fresh division upon every birth, and upon every death a fresh division; or the inutility and folly of the original division must stand confessed.

Of this perpetual necessity of fresh divisions, what would be the result? Nobody would have any thing he could call his own: all property would in effect be destroyed — all present property, and all prospect of security in respect of property in future: all idea of subsistence except from hand to mouth: all incentive to labour beyond the satisfaction of the necessities of the day; for why should I bestow my labour to-day in the improvement of that property, which may be torn from me to-morrow?

A fresh division would again require to take place every time a person became helpless to such a degree as to be unable to make his own little property (his £15, his £10 a-year, or whatever the original portion of £20 was redued to) suffice for his own maintenance — a fresh division, or some other arrangement capable of answering the same purpose. Every birth adds, during the age of helplessness, to the sum of burthens; every death, by taking from the sum of burthens, adds relatively to the sum of benefits. But the addition made to the sum of burthens by infirmity happening to a grown person, is much greater than that made by the birth of an infant: the adult requires many times as much as the infant for his sustenance. The portion of the adult, now become helpless, was too small to afford him subsistence without the benefit of his labour to improve it. Being now incapable of all labour, he must either perish, or, to keep him alive, the portion of other people must be laid under contribution to make up the difference. Here, then, comes the necessity of a system to answer the purpose of the present poor-law with this difference — that for maintai

the growing increase of the poor, there remain none but what are poor already. The dispensations of equality have brought back the age of virtue—be it so: but virtue, however it may diminish disease, will not destroy it; virtue will not extirpate the small-pox nor the contagious fever; virtue will not prevent legs nor arms from breaking; virtue will not give robustness nor agility to the extremity of old age.

Equality amongst the members of a community—equality, whatever be the standard portion—includes two points: that no member shall have more than that portion; and that no one shall have less. The first of these points is attainable by the equalisation system to great perfection: the latter not. To the latter, this pure and exalted system is not more competent than the present abusive and corrupt one: it is even much less so. To industry it affords no new encouragement; on the contrary, it takes from it whatever encouragement it has at present. To what purpose should I earn more than the poorest of my fellow-citizens, when so much as I earn more than them, so much will be taken from me. Neither to idleness or to dissipation does it administer any new discouragement; on the contrary, it gives to both of these dispositions encouragement, and that the greatest they can receive. Putting idleness upon a footing of equality in point of future advantage with industry, and dissipation with frugality, it gives to each the portion of present pleasure with which it is attended, clear. Why, so long as I have a penny left, should I refuse the most expensive desire its gratification—when, whatever I dissipate of my own present stock, must be made up to me from that of other people? To what purpose, while I have a penny left, should I plague myself with working—when, so long as I have any thing to pay, others will work for me with pay, and when I have no longer pay to give them, they must work for me without it?

Here, then, is a perpetual race between dissipation and idleness on the one hand, and that plan of division, whatever it be, by which the law of equalisation is carried into execution, on the other: dissipation and idleness continually widening the gap; division of property using its best endeavours to fill it up. But the pace of dissipation is the pace of the racer; the pace of legal division that of the tortoise.

All this while, the members of the community are divided into two classes: the industrious and frugal, slaves toiling for others: the idle and prodigal, lords and masters, enjoying for themselves. Such would be the fruit of the equalisation system, while the execution of it was going on, until a certain portion of the national wealth having been destroyed in a variety of ways, and a certain portion of the national population destroyed by a mixture of famine and excess, the miserable would awaken from their delirium, curse the system and its inventors, and join their endeavours to bring back the former state of things.

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PRINCIPLES OF PENAL LAW.*

PART I.

POLITICAL REMEDIES FOR THE EVIL OF OFFENCES.

CHAPTER I.

SUBJECT OF THIS BOOK.

After having considered offences as diseases in the body politic,† analogy leads us to regard as remedies the means of preventing and repairing them.

These remedies may be arranged under four classes: —

1. Preventive Remedies.
2. Suppressive Remedies.
3. Satisfactive Remedies.
4. Penal Remedies, or simply Punishments.

Preventive Remedies. — The different methods of preventing a crime may be thus called. Of these there are two sorts: Direct methods, applying immediately to a particular offence: Indirect methods, consisting in general precautions against a whole class of offences.

Suppressive Remedies. — These are means which tend to cause an offence to cease — an offence begun, but not completed, and consequently, to prevent at least a portion of the evil.

Satisfactive Remedies are those by which reparation is made, or indemnification given to an innocent person, on account of the evil he has suffered by an offence.

Penal Remedies, or simply Punishments. When the evil has been made to cease, when the party injured has been indemnified, it is still necessary to prevent the recurrence of similar offences, both on the part of the offender and of every one else.

There are two methods by which this end may be obtained: the one by correcting the will; the other by taking away the power to injure. The will is influenced by fear. Power is taken away by physical restraint. To take away from an offender the will to offend again, is to reform him: to take away the power of offending is to incapacitate him. A remedy which ought to act by means of fear, is it called a *punishment?* has it, or has it not, the effect of incapacitating? This depends upon its nature.

The principal end of punishments is to prevent like offences. The past offence is only as one point; the future is infinite. The past offence concerns only one individual; similar offences may affect every one. In many cases, the evil committed is irreparable; but the will to do evil may always be taken away, because, how great soever the advantage of the offence may be, the evil of the punishment may be made to surpass it.

These four classes of remedies may sometimes require different operations; sometimes the same operation will suffice for all.

We shall treat in this Book of Direct Preventive Remedies—of Suppressive Remedies —and of Satisfactitive Remedies. The second part will treat of Punishments, and the third of Indirect Preventive Remedies.

CHAPTER II.

OF DIRECT METHODS OF PREVENTING OFFENCES.

Before an offence is consummated, it may announce itself in various manners: it may pass through degrees of preparation, which often allow of its being stopped before it reaches its catastrophe.

This part of police may be exercised either by powers conferred on all persons, or by special powers delegated to persons in authority.

The powers conferred on all persons for their protection are such as may be exercised before justice intervenes, and may for this reason be called *antejudicial methods.* Such is the right of opposing by force the execution of an apprehended offence; the seizing a suspected person, and keeping him in custody; the taking him before the judge; the using force; the sequestering in respon-

* The following work is edited from the Traités de Legislation published by Dumont, and the original MSS. of Bentham.

† See Introduction to Morals and Legislation.

hands any thing supposed to be stolen, or which may be expected to be destroyed; the arresting all the assistants as witnesses; the requiring the aid of every one, in order to conduct before the magistrates those who may be suspected of evil designs.

The obligation of rendering such services might be imposed, and every citizen required to render them, as one of the most important duties in society: it might also be well to establish rewards for those who have assisted in preventing an offence, and delivering the offender into the hands of justice. Will it be said, that these powers may be abused, and that individuals might use them for the purposes of depredation? Such danger is imaginary. This affectation of order and publicity could only oppose their designs, and expose them too manifestly to punishment.

General Rule. — There is not much danger in granting rights which can only be enjoyed by an exposure to all the inconveniences of their exercise in case they should not be recognised.

To refuse to justice the assistance it may derive from all these means, would be to suffer an irreparable evil, from the fear of an evil which could be repaired.

Independently of these powers, which ought to belong to all, there are others which only belong to magistrates, and which may be of great use in preventing offences which are apprehended.

1. *Admonition.* — It is a simple lesson, but given by a judge, cautioning the suspected individual, showing that he is observed, and recalling him to his duty by a respectable authority.

2. *Threatening.*—This is the same method, but enforced by the menace of the law. In the first, it is the paternal voice which uses the language of persuasion: in the second, it is the magistrate who intimidates by the language of severity.

3. *Promises required of keeping from a certain place.* — This method, applicable to the prevention of many offences, is particularly so to quarrels, personal offences, and seditious practices.

4. *Partial Banishment.*—Prohibition to the suspected individual to present himself before the threatened party, to be in the same dwelling-house, or in any other place intended as the theatre of the crime.

5. *Bail.* — Obligation to furnish bondsmen, who will engage to pay a fine in case of contravention of the separation required.

6. Establishment of *Guards* for the protection of persons or things threatened.

7. *Seizure* of arms or other instruments intended to be employed in the apprehended offence.

Besides these general methods, there are some which apply specially to certain offences. We shall not here enter into these details of police and administration. The choice of these methods, the occasion, the manner of applying them, depend upon a great number of circumstances; on the other hand, they are sufficiently simple, and almost always pointed out by the nature of the case. In case of injurious defamation, the writings may be seized before publication. With respect to unwholesome eatables, liquors, or medicines, they may be destroyed before they are made use of. Judicial visits and inspections may serve to prevent frauds, clandestine acts, and smuggling.

These kinds of cases rarely admit of precise rules. Much must necessarily be left to the discretion of the public officers and judges; but the legislator ought to give them instructions, to hinder the abuse of their arbitrary powers.

These instructions should be framed upon the following maxims: The more rigorous the means employed, the more scrupulous should they be in their use. More may be done, in proportion to the grandeur of the offence apprehended and its apparent probability — in proportion also as the offender appears more or less dangerous, and as he has greater or less means of accomplishing his evil designs.

There is one limit which ought never to be neglected: "No method of prevention should be employed, which is likely to cause a greater mischief than the offence itself."

CHAPTER III.

OF CHRONIC OFFENCES.

HAVING treated of suppressive remedies, that is to say, of the methods of causing offences to cease, let us see what are the offences which can thus be made to cease, for all have not this capacity, and those which have, have it not in the same manner.

The possibility of causing an offence to cease, supposes a duration sufficiently great to admit of the intervention of justice. But all offences have not this duration: some have a transient effect; the effect of others is permanent. Homicide and rape are irreparable: theft may last only a moment; it may also last for ever, if the thing stolen have been consumed or lost.

It is necessary to distinguish the circumstances under which offences have a greater or less duration, because they affect the suppressive methods which are applicable to them respectively.

1. An offence acquires duration, by the simple continuance of an act capable of ceasing at each moment, without ceasing to have been an offence. The detention of a person,

the concealment of any thing, are offences of this nature. First class of chronic offences, *ex actu continuo.*

2. Is the design to commit an offence, regarded as an offence? it is clear, that the continued design will be a continued offence. This class of offences may coincide with the former, *ex intentione persistente.*

Among other offences which possess duration, are the greater number of negative offences, of those which consist of omissions: not to provide for the nourishment of a child with which one is chargeable; not to pay his debts; not to surrender to justice; not to discover his accomplices; not to put an individual into possession of a right which belongs to him. Third class of chronic offences, *ex actu negativo.*

4. There are some corporeal works, of which the existence is a prolonged offence: A manufacture injurious to the health of a neighbourhood; a building which obstructs a road; a bank which contracts the course of a river, &c. Fourth class of chronic offences, *ex opere manente.*

5. The productions of the mind may possess the same character, through the intervention of printing. Such are libels, pretended histories, alarming prophecies, obscene prints; in a word, every thing which presents to the eyes of the citizens, under durable signs, ideas which ought not to be presented to them. Fifth class of chronic offences, *ex scripto et similibus.*

6. A train of actions may possess a character of unity, in virtue of which, he who performs them is said to have contracted a habit. Such are the coining of money; of the processes prohibited in a manufacture; smuggling in general. Sixth class of chronic offences, *ex habitu.*

7. There is a kind of duration in certain offences, the which, though they differ among themselves, take a character of unity, from the one having been the occasion of the other. A man having committed waste in a garden, beats the proprietor, who comes to oppose him; he follows him into the house, insults his family, destroys his furniture, kills his favourite dog, and continues his depredations. Thus an indefinite series of offences is formed, during the continuance of which, opportunity may occur for the intervention of justice. Seventh class of chronic offences, *ex occasione.*

8. There is a kind of duration in the case of many offenders, who either, with or without concert, pursue the same object. Thus, of a confused mixture of acts of destruction, threats, verbal and personal, injuries, insulting cries and provoking clamours, is formed the sad and terrible compound called tumult, riot, insurrection — forerunners of rebellion and civil wars. Eighth class of chronic offences, *ex co-operatione.*

Chronic offences are liable to have their catastrophe. The projected offence terminates in the consummated offence. Simple corporal injuries have for their natural termination, irreparable corporal injuries and homicide. With respect to imprisonment, there is no crime which it may not have for its object: to unloose an inconvenient matrimonial connexion — to accomplish a project of seduction — to suppress a testimony — to extort a secret — to hinder the reclaiming of property — to obtain forced assistance in an outrageous enterprise; — in a word, imprisonment may always have some particular catastrophe, according to the design of the offender.

In the course of a criminal enterprise, the end may be changed as well as the means. A thief surprised may, from fear of punishment, or regret for having lost the fruit of his crime, become an assassin.

It belongs to the foresight of the judge to represent to himself, in each case, the probable catastrophe of the offence commenced, in order to prevent it by a prompt and well-directed interposition. In order to determine the punishment, he ought to regard the intentions of the offenders: in applying preventive or suppressive remedies, he ought to regard all the probable consequences, as well those which have been intended, as those which have been neglected or unforeseen.

CHAPTER IV.

OF SUPPRESSIVE REMEDIES FOR CHRONIC OFFENCES.

THE different kinds of chronic offences require different suppressive remedies. These suppressive means are the same as the preventive means, of which we have already given a catalogue. The difference lies only in the time of their application.

In some cases, the preventive means correspond so exactly with the nature of the offence, that it is scarcely necessary to point them out. It is clear that injurious imprisonment requires liberation — that theft requires restoration in kind. The only difficulty is to know where to find the thing or the person detained.

There are other offences, such as seditious mobs, and certain negative offences—in particular, the non-payment of debts, which require more far-fetched means for their suppression. We shall have occasion to examine these under their proper heads.

The evil of dangerous writings is more difficult to suppress. They hide themselves — they re-appear; they spring up with new

vigour after the most rigorous proscriptions. We shall find among the *indirect methods*, those which are most efficacious in opposing them.

Greater latitude must be left to the magistrate with respect to suppressive means, than with respect to preventive means. The reason is clear. Is an offence to be suppressed? there is a crime already proved, and a punishment appointed in consequence? Nothing is risked in making it cease, so long as what would be done for its punishment is not exceeded. Is an offence to be prevented? too many scruples can hardly be felt: there may be no such offence in agitation; it may be attributed to the wrong person; it may be that the individual suspected acts only with a good intention, and, instead of becoming culpable, will stop of himself. All these possibilities require a more gentle and regulated procedure, in proportion as the apprehended crime is problematical.

Particular means for preventing or suppressing illegal detention or deportation.

These means may be reduced to the following precautions: —

1. The keeping a register of all places in which persons are confined, without their consent: Prisons, hospitals for the insane and idiots, and private houses into which invalids of this class are received.

2. The keeping a register of the cause of the detention of each prisoner; the not permitting the detention of a madman but after a judicial consultation of physicians, signed by them. These two registers, preserved in the tribunals of each district, should be publicly exposed, or at least allowed to be freely consulted by every body.

3. To determine upon some signal which should, as much as possible, be in the power of every person who is carried off, to the effect of authorizing the passers by to call the ravishers to account; to accompany them if they declare that they wish to carry the prisoner before the judges; or to take them thither themselves, if they have a different intention.

4. To grant to every one the right to apply for the opening of every house in which he suspects that the person he seeks for is detained against his will.

CHAPTER V.

OF MARTIAL LAW

IN England, in the case of seditious mobs, they do not begin with military assassination: warning precedes punishment; martial law is proclaimed, and the soldier cannot act till after the magistrate has spoken.

The intention of this law is excellent: but does the execution correspond with it? The magistrate is to go into the midst of the tumult, and read a long and tiresome formula which no one understands; and woe be to those who, an hour afterwards, are in that place! they are declared convicted of a capital offence. This statute, dangerous to the innocent, difficult to be executed against the guilty, is a compound of weakness and violence.

At the moment of disorder, the presence of the magistrate ought to be announced by some extraordinary sign. The *red flag*, so famous in the French revolution, had a great effect upon the imagination. In the midst of clamour, the ordinary means of language do not suffice. A multitude can only use their eyes: their eyes should therefore be addressed. A speech requires attention and silence, but visible signs have a rapid and powerful operation: they speak the whole at once; they have only one meaning, which cannot be equivocal: an intentional noise, a concerted report, cannot prevent their effect.

Besides, words lose their influence from a crowd of unforeseen circumstances. Is the speaker hated, the language of justice becomes hateful when uttered by him? His character, his behaviour, his first appearance, are these ridiculous? this ridicule extends to his functions, and degrades them — another reason for speaking to the eyes by respectable symbols, which are not subject to the same caprices.

But as it may be necessary to add words to signs, a speaking trumpet is essentially necessary. Even the singularity of this instrument would contribute to give more eclât and dignity to the orders of justice, by removing all idea of familiar conversation, by impressing the conviction that it was not the simple individual himself who was heard, but a privileged minister, the herald of the laws.

This method of making one's self heard at a distance, has been long employed at sea, where distance, the noise of the winds and the waves, have made the weakness of the voice sensible. Poets have often compared a people in commotion to the sea in a storm: ought this analogy to be acknowledged only as a source of amusement? It would be of much greater importance in the hands of justice.

The orders should be in few words — nothing which appears like ordinary discourse or discussion — no reference to the king — but to justice alone. The head of the state may be justly or unjustly an object of aversion — this aversion may even be the cause of the tumult: to recal this idea would be to inflame the passions, instead of calming them. If he be not odious, why expose him

to the liability of becoming so? Every favour, every thing which bears the character of benevolence, ought to be represented as the work of the father of his people. All rigour, all acts of severity, need be attributed to no one. The hand which acts may be artfully hidden. They may be thrown upon some creature of the imagination, some animated abstraction — such as justice, the daughter of necessity and mother of peace, whom men ought always to fear, but never to hate, and who always deserve their first homage.

CHAPTER VI.

OF THE NATURE OF SATISFACTION.

WHAT is satisfaction? A benefit received in consideration of an injury. If it refer to an offence, satisfaction is an equivalent given to a party injured, on account of the injury he has suffered.

Satisfaction is *plenary*, when, upon adding up the two sums — the one of the evil suffered, the other of the good received — the value of the second appears equal to the value of the first, in such manner, that if the injury and the reparation could be repeated, the event would appear indifferent to the party injured. Does the reparation want any thing in value to make it equal in value to the evil? the satisfaction is only partial and imperfect.

Satisfaction has two aspects or two branches: the *past* and the *future*. Satisfaction for the past is called indemnification; satisfaction for the future consists in making the evil of the offence to cease. Does the evil cease of itself? nature exercises the functions of justice, and the tribunals have nothing in this respect to do.

Has a sum of money been stolen? so soon as it is restored to its owner, satisfaction for the future is complete. It remains only to indemnify him for the past, for the temporary loss he has experienced during the continuance of the crime.

But with respect to a thing wasted or destroyed, satisfaction for the future can only have place by giving to the party injured something similar or equivalent. Satisfaction for the past consists in indemnifying him for the temporary privation.

CHAPTER VII.

REASONS UPON WHICH THE OBLIGATION TO MAKE SATISFACTION IS FOUNDED.

SATISFACTION is necessary in order to cause the evil of the first class to cease, and re-establish every thing in the condition it was in before the offence; to replace the individual who has suffered in the lawful condition in which he would have been if the law had not been violated.

Satisfaction is still more necessary in order to cause the evil of the second class to cease: punishment alone does not effect this. It tends, without doubt, to diminish the number of offenders; but this number, though diminished, cannot be considered as null. The examples of crimes committed more or less publicly, will excite more or less of apprehension. Each observer will there see a chance of suffering in his turn. Is it wished that this feeling of dread should disappear? it is necessary that satisfaction should follow as constantly as punishment. If the crime be followed by punishment without satisfaction, so many offenders punished, so many proofs that the punishment is inefficacious, and consequently so much alarm which presses on society.

But we must make one essential observation here. In order to take away the alarm, it is sufficient that the satisfaction should appear complete to the eyes of the observers, when it may not be so to the eyes of the persons interested.

How shall we judge if the satisfaction be perfect, with respect to him who receives it? The balance in the hands of passion will always incline to the side of interest. To the miser you can never give enough: to the revengeful, the humiliation of his adversary never appears sufficiently great. It is necessary, then, to imagine an impartial observer, and to regard as sufficient the satisfaction which would make him think that, for such a price, he would hardly regret to receive such an injury.

CHAPTER VIII.

OF THE DIFFERENT KINDS OF SATISFACTION.

SIX kinds of satisfaction may be distinguished:

1. *Pecuniary Satisfaction.* — The means of procuring almost all pleasures, money is an efficacious compensation for many evils; but it is not always in the power of the offender to furnish it, nor agreeable to the party offended to receive it. Offer an offended man of honour the mercenary price for an insult, it is a new affront.

2. *Restitution in kind.* — This satisfaction consists either in restoring the thing which has been taken away, or in giving a like thing, or an equivalent, for that which has been taken away or destroyed.

3. *Attestative Satisfaction.* — If the evil result from a falsehood, from a false opinion with respect to a point of fact, the satisfaction is completed by a legal attestation of its truth.

4. *Honorary Satisfaction.* — An operation

which has for its object either to maintain or re-establish, in favour of an individual, a portion of honour, that the offence of which he has been the object has made him lose, or run the risk of losing.

5. *Vindictive Satisfaction.* — Every thing which inflicts a manifest pain upon the offender may yield a pleasure of vengeance to the party injured.

6. *Substitutive Satisfaction* — or satisfaction at the expense of a third party; as when a person who has not committed a crime finds himself responsible in his fortune for him who has committed it.

In determining the choice of the kind of satisfaction to be granted to an injured party, three things should be considered: the *facility* of furnishing it; the nature of the evil to be compensated; and the feelings which may be supposed to belong to him. We shall soon recur to these different heads, for the purpose of considering them more at large.

CHAPTER IX.

OF THE QUANTITY OF SATISFACTION TO BE GRANTED.

So much as the satisfaction wants of being complete, so much evil remains without remedy. What is required to prevent deficiency, in this respect, may be reduced to two rules:—

1. The evil of the offence must be followed in all its parts — in all its consequences, that the satisfaction may be proportioned to it.

With respect to irreparable corporal injuries, two things should be considered: a means of enjoyment, a means of subsistence, has been taken away for ever. It is not possible to bestow compensation in kind, but it is possible to apply to the evil a perpetually recurring gratification.

With respect to homicide, it is necessary to consider the loss sustained by the heirs of the deceased, and to make compensation for it, by a gratification once paid, or periodically paid during a longer or shorter time.

With respect to an offence against property, we have seen, in treating of pecuniary satisfaction, all that it is necessary to observe to make the reparation rise to the amount of the loss.

2. In case of doubt, make the balance incline in favour of him who has suffered the injury, rather than of him who has done it.

All the accidents should be placed to the account of the offender: every satisfaction ought to be rather superabundant than defective. If superabundant, the excess can only serve to prevent like offences, in the character of punishment: if defective, the deficiency always leaves some degree of alarm; and, in crimes of enmity, all the evil not compensated is a subject of triumph for the offender.

Laws have every where been imperfect upon this point. On the side of punishment, excess has been little dreaded: on the side of satisfaction, little trouble has been taken with reference to deficiency. Punishment, an evil which when in excess, is purely mischievous, is scattered with a lavish hand; whilst satisfaction, which altogether produces good, is given with a grudging parsimony.

CHAPTER X.

OF THE CERTAINTY OF SATISFACTION.

THE certainty of satisfaction is an essential branch of security. Whatever diminution there is in this respect, is so much security lost.

What should be thought of those laws which, to the natural causes of uncertainty, add factitious and voluntary ones? It is to obviate this defect that we lay down the two following rules:—

1. The obligation of satisfying shall not be extinguished by the death of the party injured. What was due to the deceased on account of satisfaction, remains due to his heirs.

To make the right of receiving satisfaction depend upon the life of the individual injured, would be to take from this right a part of its value: it is the same as if a perpetual rent was reduced to a life annuity. Its enjoyment can only be obtained by a process which may occupy a long time. As regards an aged or infirm person, the value of this right declines with himself; as regards a dying person, this right is worth nothing.

Besides, if you diminish the certainty on the side of satisfaction, you increase in the delinquent the hope of impunity. You show him, in perspective, a period at which he may enjoy the fruit of his crime: you give him a motive for retarding, by a thousand obstacles, the judgments of the tribunals, or even for hurrying on the death of the party injured. You at least put out of the protection of the laws, the persons who have need of the greatest care — the sick and the dying.

It is true, that supposing the obligation to render satisfaction extinct by the death of the party injured, the offender may be subjected to another punishment; but what punishment would be so suitable as this?

2. The right of the party injured shall not be extinguished by the death of the offender, or of the author of the damage. What was due from him on account of satisfaction, shall be due from his heirs.

To determine otherwise, would be again

to diminish this right, and to encourage crime. That a man, because his death is near, should commit an injustice without any other object than the advantage of his children, is a case which is not very rare.

It may be said, that if the party injured be satisfied after the death of the offender, it is by an equal suffering imposed upon his heir. But there is a wide difference. The expectation of the party injured is a clear, precise, decided expectation, firm in proportion to his confidence in the protection of the laws. The expectation of the heir is only a vague hope. What is its object? Is it the entire inheritance? No: It is only the unknown net produce, after all legitimate deductions. That which the deceased might have spent upon his pleasures, he has spent upon his misdeeds.

CHAPTER XI.

OF PECUNIARY SATISFACTION.

THERE are some cases in which pecuniary satisfaction is demanded by the nature of the offence itself: there are other cases in which it is the only one allowed by the circumstances. It ought to be preferred on the occasions in which it promises to have its greatest effect.

Pecuniary satisfaction is at its highest point of suitability in the cases in which the damage sustained by the party injured, and the advantage reaped by the offender, are equally of a pecuniary nature, as in theft, peculation, and extortion. The evil and the remedy are homogeneous — the compensation may be exactly measured by the loss, and the punishment by the profit of the offence.

This species of satisfaction is not so well founded when there is a pecuniary loss on one side, without any pecuniary profit on the other; as in waste, on account of enmity, by negligence or by accident.

It is still less well founded in the cases in which neither the evil suffered by the party injured, nor the advantage reaped by the author of the crime, can be valued in money; as in injuries which relate to honour.

The more a method of satisfaction is found incommensurable with the damage—the more a method of punishment is found incommensurable with the advantage of the offence — the more are they respectively liable to lose their aim.

The ancient Roman law, which awarded a crown as an indemnification for a box on the ear, did not provide for the security of honour. The reparation had no common measure with the outrage, its effect was precarious, whether as satisfaction or as punishment.

There still exists an English law which is a remnant of barbarous times: *manent vestigia ruris.* A daughter is considered as the servant of her father. Is she seduced, the father can obtain no other satisfaction than a sum of money, the price of the domestic services of which it is considered that he may be deprived by the pregnancy of his daughter.

In personal injuries, a pecuniary indemnification may be suitable or not, according to the fortunes on the one side and the other.

In regulating a pecuniary satisfaction, the two branches of the *past* and of the *future* ought not to be forgotten. Satisfaction for the future consists simply in making the evil of the offence to cease: satisfaction for the past, consists in indemnification for the wrong suffered. The payment of a sum due is satisfaction for the future; the payment of the interest accrued on this sum is satisfaction for the past.

Interest ought to accrue from the moment the mischief which it is intended to compensate happens; from the moment, for example, from which the payment due has been delayed — or the thing has been taken, destroyed, or damaged — or the service which ought to have been rendered has been neglected.

Interests granted on account of satisfaction ought to be higher than the ordinary rate of commerce, at least when evil intention is suspected.

This excess is highly necessary: if the interest were only equal, there would be many cases in which the satisfaction would be incomplete, and other cases in which a profit would remain to the delinquent; a pecuniary profit, if he have wished to procure a forced loan at the ordinary rate of interest; a pleasure of vengeance or enmity, if he have wished to hold the injured party in a state of want, and to enjoy his distress.

For the same reason, compound interest ought to be calculated; that is to say, the interest ought to be added to the capital, each time that the interest ought, according to custom, to become due, since the capitalist, at the expiration of every such term, might convert his interest into capital, or derive some equivalent advantage from it. Leave this part of the damage without satisfaction, there will be, on the part of the proprietor, a loss, and on the part of the delinquent a gain.

Among co-delinquents, the expense of the satisfaction ought to be divided among them according to their fortunes, except when this division ought to be modified according to the different degrees of their criminality. In truth, the obligation to make satisfaction is a punishment, and this punishment would be on the pinnacle of inequality, if co-delinquents of unequal fortunes were taxed equally.

CHAPTER XII.

OF RESTITUTION IN KIND.

RESTITUTION in kind is principally of importance with regard to things which possess a value in affection.*

But it ought to be made on all occasions, if possible. The law ought to ensure to me every thing which is mine, without forcing me to accept equivalents, which are not even such so soon as I dislike them. Without restitution in kind, security is not complete. What security is there for the whole, when there is no security for any part?

A thing taken away, either honestly or dishonestly, may have passed into the hands of an honest acquirer. Shall it be restored to the first proprietor? shall it be continued in the possession of the second? The rule is simple: it ought to remain with him who may be presumed to have the greatest affection for it. Now this superior degree of affection may be easily presumed from the relation which has been borne to it, from the time that it has been possessed, from the services which have been drawn from it, from the care and expense which it has cost. These indications commonly unite in favour of the true original proprietor.†

The preference is equally due to him in the cases in which there is any doubt; for these reasons: — 1. The last proprietor may have been an accomplice, without the proofs of this complicity having been obtained. Is the suspicion unjust? Formed by the law, and not by the man, bearing upon the species, and not upon the individual, it does not produce any impeachment of honour. 2. If the acquirer be not an accomplice, he may be culpable from negligence or temerity, either by omitting the ordinary precautions for verifying the title of the vender, or by giving too easy a belief to slight indications. 3. With respect to weighty offences, such as violent robbery, it is proper to give the preference to the first possessor, in order to strengthen the motives which engage him in pursuit of the offender. 4. Has the spoliation arisen from malice? to leave the thing in the possession of any one besides the stript proprietor, would be to leave the offender in possession of the profit of his crime.

A purchase at a low price ought always to be followed by restitution, on the price being repaid. This circumstance, if it do not prove complicity, is at least a strong presumption of dishonesty. The buyer could not hide from himself the probability of an offence on the part of the seller; for that which causes the low price of stolen goods, is the danger of taking them to an open market.

When the acquirer, being deemed innocent, is obliged, on account of the dishonesty of the seller, to restore any article to the original proprietor, this ought to be accompanied by the payment of a pecuniary equivalent, regulated by the judge.

The simple expense of keeping — for still stronger reasons, improvements and extraordinary expenses — ought to be liberally repaid to the posterior acquirer. This is not only a means of promoting the general wealth; it is also the interest even of the original proprietor. According as this indemnity is granted or refused, the improvement of the article is either promoted or hindered.‡

Neither the original proprietor, nor the posterior acquirer, ought to gain at the expense, the one of the other: the loser ought to have recourse for his indemnity, in the first instance, to the delinquent, afterwards to the subsidiary funds, of which we shall hereafter speak.‖

* Of this kind are immoveables in general; family relics, portraits, works executed by esteemed individuals — domestic animals, antiquities, curiosities, pictures, manuscripts, instruments of music; in fact, all that is unique, or appears to be so.

† If it refer to a thing or an animal which reproduces, a judgment may be formed in the same manner, as to the side on which the superiority of affection will be found with respect to the fruits and the products; as the wine of a particular vine, the foal of a favourite horse, &c. However, the pretensions of the anterior proprietor have not so much force in this case, as in the other. The last possessor is only the second proprietor of the animal or thing which produces, but he is first proprietor of the productions themselves.

‡ It matters not whether the acquirer be honest or dishonest. It is not for him, but for you the true proprietor, that an interest is given to him in taking care of the estate or thing which has fallen into his possession. That he should derive a profit from all the good he does to it, nothing can be more wise. It would be possible to establish a punishment against the omissions which should cause it to perish; but its maintenance will be better secured by offering a reward, or rather an indemnification for, care in its preservation. There are many cases in which it would be difficult to prove the offence of negligence; and besides, when reward finds its natural place, and does not produce danger, reward and punishment together are worth more than punishment alone.

‖ I lose a horse worth thirty pounds; you buy it of a man who sells it to you as his own for ten pounds. In virtue of the above rule, you would be obliged to give it up to me, on receiving from me what you gave for it. I am the loser: It remains for me to recover from the seller my ten pounds, and on his default I ought to have relief from the public treasure. But if, instead of adjudging the horse to me, it had been adjudged to you (which might be reasonable under certain circumstances,) then you ought to be obliged to pay me his full value, otherwise I am made to suffer a loss, in order to procure a gain for you. But in this case, you have your remedy against

When identical restitution is impossible, restitution of a similar thing ought, as far as possible, to be substituted. Suppose two rare medals of the same die: the possessor of one of them, after having got possession of the other, either by negligence or design, destroys or loses it. The best satisfaction in this case, is to transfer the medal which belongs to him, to the party injured.

Pecuniary satisfaction, in offences of this kind, is apt to be found insufficient, or even null. Value in affection is rarely appreciated by third persons. It requires a highly enlightened benevolence, an uncommon philosophy, in order to sympathize with tastes which are not our own.

The Dutch florist, paying in pounds of gold for a tulip bulb, smiles at the antiquary who purchases at a great price a rusty lamp.*

Legislators and judges have often thought like the vulgar: they have applied unpolished rules to what demanded a delicate discernment. To offer, in certain cases, an indemnification in money, is no satisfaction—it is insult. Would gold be taken for the portrait of a beloved object, if stolen by a rival?

Simple restitution in kind leaves a deficiency in the satisfaction, proportioned to the value of the enjoyment lost during the continuance of the offence. How shall this value be estimated? This will be made clear by an example. A statue has been illegally taken away: this statue, sold by auction, would fetch one hundred pounds, according to the opinion of the best judges. Between the taking away and the restitution, a year has elapsed: the interest of money is five per cent.; place to the head of satisfaction for the past, ordinary interest, five pounds; for penal interest (according to chap. xi.) say two and a half; total, seven pounds ten shillings per cent.

In valuing interests, the deterioration, whether accidental or necessary, that the object may have undergone in the interval between the commission of the offence and the fact of restitution, ought not to be neglected. The statue may not necessarily have lost any thing, but a horse of the same price would necessarily have diminished in value. A collection of tables of natural deterioration, year by year, according to the nature of the object, is one of the articles needed in the library of justice.

the property of the offender, or, on his default, against the public treasure.

* Some years ago a Canary bird gave rise to a lawsuit before one of the Parliaments in France. A journalist, who has given an account of it, amused himself at the expense of both parties, and regarded the whole affair as ridiculous. I am not of his opinion. It is imagination which gives their value to the objects we esteem most precious. In laws made solely in accordance with the universal opinions of men, can too marked an attention be made to the preservation of every thing which constitutes their happiness? Ought this sensibility, which attaches us to the beings which we have reared, which we have become accustomed to, and whose whole affections are fixed on us, to be forgotten? This suit, so frivolous in the eyes of the journalist, was only too serious, since one of the parties sacrificed to it, not only his money, but his probity and his honour. An object esteemed at such a price cannot be called a bagatelle.

CHAPTER XIII.

OF ATTESTATIVE SATISFACTION.

THIS method of satisfaction is particularly adapted to crimes of falsehood, from which any opinion results prejudicial to an individual, without its being possible to estimate the amount of the damage or its extent, or even the existence of its effects. So long as the error exists, it is a constant source of actual or probable evil: there is only one method of stopping it; that is, establishing the contrary truth by evidence.

The enumeration of the principal offences of falsehood will naturally find a place here.

1. *Simple mental injuries, consisting in spreading false alarms:* for example, tales of apparitions, ghosts, vampires, sorcery, demoniacs, possessions, &c.; false reports of a nature to fill any individual with fear or sorrow: pretended deaths, bad conduct of parents and relations, conjugal infidelity, loss of goods, &c.; falsehoods likely to alarm a more or less numerous class; as reports of pestilence, invasion, conspiracy, incendiarism, &c.

2. *Offences against reputation*, among which may be distinguished many kinds. *Positive defamation*, by facts set down, or by ingenious libels. *Weakening of reputation*, which consists in weakening what cannot be destroyed; in hiding from the public, for example, a circumstance which would add to the eclât of a celebrated action. *Interruption of reputation*, which consists in suppressing a fact, concealing a work honourable to a certain individual, or in taking from him the opportunity of distinguishing himself, by causing an enterprise to be regarded as impossible or accomplished. *Usurpation of reputation:* All plagiarism, whether by authors or artists, are examples of this.

3. *Fraudulent acquisition.*—Examples:—False reports, for the purpose of stock-jobbing; false reports to influence the price of the negotiable securities of any commercial company.

4. *Disturbance of the enjoyment of the rights attached to a domestic or civil condition.*—Example: The denying to the right possessor, the possession of his condition; of a husband with regard to a certain woman—of wife with respect to a certain man—of child with regard to a certain man or woman; the attributing falsely a like condition to

one's self; the acting a falsehood of the same kind with respect to any civil condition or privilege.

5. *Hindering acquisition.* — Hindering a man from acquiring or selling, by false reports; disputing the value of any thing or the right to sell it; hindering a person from acquiring a certain condition, as marriage, by false reports, which cause it to be deferred, or not to take place.

In all these cases, the arm of justice would be powerless; forcible methods would be in vain, or imperfect. The only efficacious remedy is an authentic declaration which destroys the falsehood. To destroy the error — to publish the truth — these are functions worthy of the highest tribunals.

What form ought to be given to attestative satisfaction? It may be varied according to all the methods of publicity: printing and publication of the judgment at the expense of the delinquent; placards distributed at the choice of the party injured; publication in the national and foreign journals, &c.

The idea of this satisfaction, so simple and so useful, has been derived from French jurisprudence. When a man had been calumniated, the parliaments almost always ordained that the sentence which re-established his reputation should be printed and placarded at the expense of the calumniator.

But why oblige the delinquent to declare that he has uttered a lie, and publicly to recognise the honour of the party injured? This plan was bad in many respects: it was wrong to prescribe to a man the expression of certain sentiments which might not be his own, and to risk the judicially commanding a lie. It was also wrong to weaken the reparation by an act of constraint; for, finally, what does a retractation made at the command of justice prove, but the weakness and the fear of him who pronounces it?

The delinquent may be the organ of his own condemnation, if it is judged proper to augment his punishment: but this may be done without deviating from the exact truth, provided that the formula which is prescribed to him, expresses the sentiments of justice as being those of justice, and not as his own. "The court has judged that I have advanced a falsehood; — the court has judged that I have swerved from the character of an honest man; — the court has judged that in all this affair my adversary has behaved as a man of honour." This is all that concerns the public and the party injured: it is a sufficiently brilliant triumph for the truth, a humiliation sufficiently great for the guilty. What would be gained by obliging him to say — "I have uttered a falsehood; — I have swerved from the character of an honest man; — my adversary has behaved as a man of honour?" This declaration, stronger than the first in appearance, is much less so in reality. The fear which dictates such disavowals, does not change the real sentiments; and whilst the mouth pronounces them before a numerous auditory, the cry of the heart is heard, so to speak, disavowing them.

With reference to a fact, justice is less liable to be deceived, and the direct avowal of falsehood required from the condemned party in his own name, would be almost always conformed to his inward conviction; but with reference to an opinion, to the opinion of the delinquent, the disavowal commanded of him will be almost always opposed to his inward conviction. In such contests, impartial persons would condemn an individual ten times for each once that he condemned himself. Is he for a moment sufficiently calm to give place to reflection? the triumph of his adversary is before his eyes, he is himself the instrument of its publication, and the irritation of wounded pride would augment the prejudices of his mind. He may be honestly deceived, and you oblige him to accuse himself of falsehood; you place him in a cruel position, in which the more honest he is, the more he will suffer; in which he will be punished the more, the less he deserves it.

CHAPTER XIV.

OF HONORARY SATISFACTION.

WE have seen in what manner those offences against reputation, which have falsehood for their instrument, may be remedied: but there are other offences of this class, more dangerous. Enmity has more certain methods of deeply attacking honour: it does not always hide itself in a timid calumny; it openly attacks its enemy, but it attacks him not with violence, which puts him in personal danger. Humiliation is the object in view. The proceeding least painful in itself is often most weighty in its consequences: by doing more mischief to the person, less injury is done to honour. A sentiment of pity must not be excited in favour of the sufferer, since this would produce a feeling of antipathy towards his adversary: he must be made an object of contempt. Hatred has exhausted all its refinements in this species of offences. It is necessary to oppose to them peculiar remedies, which we have distinguished by the name of Honorary Satisfaction.

To perceive this necessity, the nature and tendency of these offences must be examined; the causes of their gravity, the remedies which have at present been found for them in duels, and the imperfection of these remedies. These researches, which relate to all that is most delicate in the human heart, have been almost entirely neglected by those

who have made the laws; they are, however, the original foundations of all good legislation in matters of honour.

In the actual state of manners among the most civilized nations, the ordinary, the natural effect of these offences, is to take away from the offended party a more or less considerable portion of his honour; that is to say, he no longer enjoys the same esteem among his fellows: he has lost a proportional part of the pleasures, the services, the good offices of all kinds, which are the fruits of such esteem; and he may find himself exposed to the disagreeable consequences of their contempt.

But since the evil essentially consists in this change which is produced in the opinions of men in general, it is these who ought to be regarded as its immediate authors. The nominal delinquent makes only a slight scratch, which, left to itself, would soon heal: it is these other persons, who, by the poisons they pour into it, make it a dangerous, and often incurable wound.

At first sight, the rigour of public opinion against an insulted individual appears a revolting injustice. A stronger, or more courageous man, abuses his superiority, and ill treats in a certain manner one whose weakness ought to have protected him: all the world, as by a mechanical movement, instead of being indignant against the oppressor, ranges itself on his side, and ungenerously causes sarcasm and contempt, often more bitter than death itself, to fall upon its victim. At the given signal by an unknown individual, the public emulously precipitates itself upon the devoted innocent, as a ferocious dog waits only the signal from his master to tear a passenger. It is thus that a scoundrel, who wishes to deliver an honest man to the torments of opprobrium, employs those whom the men of the world calls honest people as the executioners of his tyrannical injuries; and as the contempt which an injury attracts is in proportion to the injury itself, this domination of evil doers is so much the more inexcusable as the abuse is more atrocious.

Whether a flagrant injury has been deserved or not, no one deigns to inquire, nor whether its insolent author is triumphant, but how it may be aggravated. It is made a point of honour to oppress the unhappy: the affront he has received has separated him from his equals, and rendered him unclean, as by a social excommunication. Thus the true evil, the ignominy with which he is covered, is much more the work of other men than of the first offender: he only points out the prey, it is they who tear it; he directs the punishment, they are the executioners.

Should a man, for example, be so far carried away as to spit in the face of another in public, what would be the mischief in itself? a drop of water, forgotten as soon as shed. But this drop of water may be converted into a corrosive poison, which shall torment him all his life. What produces this metamorphosis? Public opinion — the opinion which distributes at its own pleasure honour and shame. The cruel adversary well knew that this affront would be the forerunner and the symbol of a torrent of contempt.

A churl, a villain, may at his own will dishonour a virtuous man! He may fill with chagrin and regret the close of the most respectable career! How does he maintain this terrible power? He maintains it because an irresistible corruption has subjugated the first and the purest of the tribunals, that of the popular sanction. By a train of deplorable collusion, all the citizens individually depend for their honour upon the most wicked among them, and are collectively under their orders, to execute their decrees of proscription upon each one in particular.

Such is the process which might be instituted against public opinion, and these imputations would not be without foundation. Mere admirers of strength are often guilty of injustice towards the feeble: but when the effects of offences of this kind are examined to the bottom, it is perceived that they produce an evil independent of opinion, and that the sentiments of the public, with respect to affronts received and tolerated, are not in general so contrary to reason as is believed on the first glance: I say in general, because many cases would be found in which public opinion is unjustifiable.

In order to understand all the evil which results from these offences, they must be considered without reference to any remedies: it must be supposed that there are none. According to this supposition, these offences might be repeated at will; an unlimited career would thus be opened to insolence: the person insulted to-day might be insulted tomorrow and the day after, every day and every hour: each new affront would facilitate the next, and render more probable a succession of outrages of the same class. But in the idea of a corporal insult, is comprehended every act offensive to the person, which can be offered without causing a durable physical evil — every thing which produces disagreeable sensation, uneasiness, or sorrow. But an act which would be scarcely sensible, if unique, may produce by repetition a very painful degree of uneasiness, or even an intolerable torment. I have somewhere read, that from water distilled drop by drop, and falling from a certain height upon the shaven crown of the uncovered head, the most cruel tortures have been produced. "A constant dropping wears away stones."

the proverb.* Thus, the individual obliged by his relative weakness to submit, at the pleasure of his persecutor, to similar vexations, and deprived, as we have supposed, of legal protection, would be reduced to the most miserable condition. Nothing more is required for establishing on the one part an absolute despotism, and on the other an entire slavery.

But he is not the slave of one, but of all who choose to make use of him. He is the puppet of the first comer, who, knowing his weakness, is tempted to abuse it. Like a Spartan Helot, dependent upon every body, always in fear and suffering — the object of general laughter, and of a contempt which is not even softened by compassion — he is, in a word, below those slaves, because their misfortune was forced upon them, and was the subject of complaint, whilst his degradation is connected with the baseness of his character.

These little vexations, these insults, have, even for another reason, a sort of pre-eminence in tyranny above more violent measures. Violent acts of anger often suffice to extinguish at once the enmity of the offender, and are frequently promptly followed by feelings of repentance, and thus present a termination to the suffering they produce: but a malignant and humiliating insult, far from exhausting the hatred which has produced it, seems on the contrary, to serve to nourish it; so that, it presents itself to the imagination as the avant courier of a train of injuries, so much the more alarming as it is undefined.

What has been said of corporal insults may be applied to threats, since even the first are of no importance except as threatening acts.

Offences by words have not altogether the same character. This is only a vague species of defamation, an employment of injurious terms, of which the signification is not determined, and which varies according to the situation of the persons.† What is shown by these injuries to the party injured, is, that he is believed worthy of the public contempt, without pointing out on what account. The probable evil which may result is the renewal of similar reproaches. It may also be feared, that a profession of contempt, publicly expressed, will lead others to join in it; it is indeed an invitation to which they willingly yield. The pride of censuring — of raising one's self at the expense of the others, — the influence of example — the disposition to believe all strong assertions give weight to these kinds of injuries. But it appears that they principally owe their weight to the neglect with which they are treated by the laws, and to the practice of duelling, a subsidiary remedy, by which the popular sanction has sought to supply the silence of the laws.

It is not astonishing that legislators, fearing to give too much importance to trifles, have left in a state of nearly universal neglect this part of security. The physical evil naturally enough taken as a measure of the importance of the crime, was nearly nothing, and the distant consequences escaped the inexperience of those who established the laws. The duel presented itself to supply this omission. This is not the place for inquiring into the origin, and examining the changes and whimsicalities apparent in this practice.‡ It is enough that the practice of duelling exists, and that, in fact, it applies itself as a remedy, and serves to restrain the enormity of the disorder, which, without it, would result from the negligence of the laws.

This practice once established, the following are its direct consequences:—

The first effect of duelling is to make the evil of the offence in a great measure to cease; that is to say, the shame which results from the insult. The offended person is no longer in that miserable condition in which his weakness exposes him to the outrages of the insolent, and the contempt of all. He is delivered from a condition of continual fear.

* In order to form an idea of the torment which results from the accumulation and duration of trifling vexations, almost imperceptible when alone, it is only necessary to recal the prolonged ticklings, and the persecutions so common in the plays and the quarrels of childhood. At this age, the least quarrels lead to acts of violence: the idea of decorum is not yet sufficiently strong to repress them; but the fickleness and the pity natural to early youth, prevents their being pushed to a dangerous point, and reflection does not give them that bitterness which a mixture of accessory ideas imparts to them in the maturity of life.

† To say that any one is a rascal, is not to reproach him with any one action in particular, but it is to accuse him in general of such conduct as brings a man to the gallows. These offensive words ought to be carefully distinguished from special defamation, from that which has a particular object. This may be refuted — it allows of attestative satisfaction. These offensive words, being vague, do not admit of being so dealt with.

‡ Many circumstances concurred in the age of chivalry to the establishment of duelling. Tournaments, single combats fashioned by glory, designed as amusements, led naturally to challenges of honour. The idea of a particular Providence, derived from Christianity, led to the interrogation of Divine Justice in this manner, and to the reference of quarrels to its decision.

Nevertheless, long before the era of Christianity, duelling was established in Spain as a mode of trial. The following passage from Livy leaves no doubt upon the question:— "*Quidam quas disputando controversias finire nequierant aut noluerant, pacto inter se, ut victorem res sequeretur ferro decreverunt. Quum verbis disceptare Scipio vellet, ac sedare iras: negatum id ambo dicere communibus cognatis; nec alium deorum hominumve quam Martem se judicem, habituros esse.*" Book xxviii. sec. 21.

The stain which the affront had imprinted on his honour is effaced; and if the challenge have immediately followed the insult, this stain will not even have made any impression: it will have had no time to fix itself; for the dishonour consists not in receiving an insult, but in submitting to it.

The second effect of duelling is to act as a punishment, and to oppose itself to the reproduction of like offences. Each new example is a promulgation of the penal laws of honour, and reminds every one that he cannot be guilty of such offensive proceedings, without exposing himself to the consequences of a private combat; that is to say, to the danger of undergoing, according to the event of the duel, either different degrees of afflictive punishments, or even the punishment of death. Hence, the courageous individual who, during the silence of the laws, exposes himself in order to punish an insult, secures the general security by exposing his own.

But, considered as a punishment, duelling is extremely defective.

1. It is not a method which can be employed by every body. There are numerous classes who cannot participate in the protection which it yields; as women, children, old persons, invalids, and those who, from defect in courage, cannot resolve to free themselves from the shame at the price of so great danger. On the other hand, by a peculiarity with respect to this point of honour, worthy of its feudal origin, the superior classes have not admitted those below them to the equality of duelling: the countryman, outraged by a gentleman, cannot obtain this satisfaction. The insult, in this case, may have less weighty effects, but it is yet an insult, and an evil without a remedy. In all these respects, duelling, considered as a punishment, is found *inefficacious*.

2. It is not always even a punishment, because opinion attaches to it a reward which may appear to many superior to all its dangers. This reward is the honour attached to this proof of courage; an honour which has often given greater attractions to duelling than its inconveniences have had power to overcome. There has been a period during which it formed part of the character of a gallant man to have fought at least once. A look, an inattention, a preference, a suspicion of rivalry — any thing was sufficient to men who only sought a pretence, and esteemed themselves a thousand times repaid for the perils they had run, by the applause they obtained from both sexes, with whom, from different reasons, bravery is equally in favour. In this respect, the punishment, amalgamated with the reward, loses its true penal character, and in another manner becomes *inefficacious*.

3. Duelling, considered as a punishment, is also defective from its excess; or, according to the proper expression, which will be explained elsewhere, it is too *expensive* a punishment. It is true, that it is often null, but it may be capital. Between these extremes of every thing and nothing, the individual is exposed to all the intermediate degrees — wounds, scars, mutilations, maiming, or loss of limbs. It is clear, that if a choice could be made with respect to satisfaction for offences of this kind, a preference would be given to a punishment less uncertain and less hazardous, which should not extend to the loss of life, nor be altogether null.

There is another peculiarity in this penal justice, which belongs only to duelling: costly to the aggressor, it is no less so to the party injured.* The offended party cannot avail himself of the right to punish the offender, without exposing himself to the punishment which he prepares for him; and even with a manifest disadvantage, for the chance is naturally in favour of him who has been able to choose his man before exposing himself. Hence this punishment is at the same time *expensive* and ill *founded*.

4. Another particular inconvenience of this duelling jurisprudence is, that it aggravates the evil of the offence itself, in all cases in which the revenge is not sought, unless the impossibility of seeking it is acknowledged. Has the offended party refused to have recourse to it, he is forced to convict himself of two capital faults, — want of courage and want of honour; want of that virtue which protects society, and without which it could not maintain itself, — and want of sensibility to the love of reputation, one of the grand foundations of morality. The offended party finds himself, therefore, under the laws of duelling, in a worse situation than if it did not exist; because if he refuse this sad remedy, it is converted into poison for him.

5. If, in certain cases, duelling, in quality of punishment, be not so inefficacious as it seems it ought to be, it is only because an innocent individual exposes himself to a punishment, which consequently is ill founded. Such are the cases of persons who, from some infirmity arising from sex, age, or health, cannot employ this means of defence. They have no resource, in this condition of individual weakness, except as chance gives them a protector, who has at the same time the will and the power to expose his own

* The Japanese surpass in this respect the men of honour of modern Europe. The European, for the chance of killing his adversary, gives him a reciprocal and equal chance. The Japanese, for the chance of leading him to rip up his own belly, begins by setting him the example.

person, and combat in their stead. It is thus that a husband, a lover, a brother, may take upon themselves the injury done to a wife, a mistress, a sister; and in this case, if the duel becomes an efficacious protection, it is only by compromising the security of a third person, who finds himself charged with a quarrel for a matter to which he is a stranger, and with respect to which he could exercise no influence.

It is certain that, considering duelling as a branch of penal justice, it is an absurd and monstrous practice; but altogether absurd, and altogether monstrous as it is, it cannot be denied but that it accomplishes its principal object—*it entirely effaces the stain which an insult imprints upon honour.* Ordinary moralists, in condemning public opinion upon this point, only serve to confirm the fact. But whether, on account of this result, duelling be justifiable or not, is of no importance: the practice exists, and it has its cause. It is essential to the legislator to discover it: a phenomenon so interesting ought not to remain unknown to him.

The insult, we have said, causes him who is the object of it to be considered as degraded by his weakness and his cowardice. Always placed between an affront and a reproach, he can no longer march with an equal step with other men, and pretend to the same regards; but when, after this insult, I present myself to my adversary, and consent to risk in a combat my life against his, I rise, by this act, from the humiliation into which I had fallen. If I die, I am thereby at least set free from the public contempt, and from the insolent domination of my enemy. If he die, I am thereby free, and the guilty is punished. If he be only wounded, it is a sufficient lesson for him, and those who may be tempted to imitate him. Am I wounded myself, or are neither of us wounded? The combat is not useless: it always produces its effect. My enemy finds that he cannot reiterate his injuries, but at the risk of his life: I am not a passive being which can be outraged with impunity: my courage protects me nearly as much as the law would have done, if it had punished such offences with an afflictive or capital punishment.

But if, when this method of satisfaction is open to me, I patiently endure an insult, I render myself despicable in the eyes of the public, because, by such conduct, there is discovered, on my part, a fund of timidity; and timidity is one of the greatest imperfections in the character of a man. A coward has always been an object of contempt.

But ought this defect of courage to be classed among the vices? The opinion which despises cowardice, is it a hurtful or useful prejudice?

It will be doubted by few but that this opinion is conformed to the general interest, if it be considered that the first wish of every individual is for his own preservation. Courage is more or less a factitious quality—a social virtue, which owes to public esteem, more than to any other cause, its birth and its increase. A momentary ardour may be kindled by anger, but a tranquil and sustained courage is only formed and nourished under the happy influences of honour. The contempt which is felt for cowardice is not, then, a useless sentiment; the suffering which rebounds upon cowards, is not a punishment lavished in pure loss. The existence of the body politic depends upon the courage of the individuals who compose it. The external security of the state against its rivals, depends on the courage of its warriors: the internal security of the state against these warriors themselves, depends upon the courage spread among the mass of the other citizens. In a word, courage is the public soul, the tutelary genius, the sacred palladium, by which alone a people can secure itself from all the miseries of servitude, can retain the condition of manhood, and not fall below the brutes themselves. But the more courage shall be honoured, the greater will be the number of courageous men, the more will cowardice be despised, and the fewer cowards will there be.

This is not all: he who, being able to fight, endures an insult, not only discovers his timidity—he also rebels against the popular sanction, which has established the law, and shows himself, in an essential point, indifferent to reputation. But the popular sanction is the most active and faithful servant of the principle of utility, the most powerful and least dangerous ally of the political sanction. If, then, the laws of the popular sanction agree in general with the laws of utility, the more a man is sensible of reputation, the more his character is ready to conform itself to virtue—the less his sensibility in this respect, the more liable is he to the seduction of every vice.

What is the result of this discussion? In the state of neglect in which the laws, till the present time, have left the honour of the citizens, he who endures an insult, without having recourse to the satisfaction which public opinion prescribes to him, by thus acting exhibits himself as reduced to a state of humiliating dependence, and exposed to receive an indefinite series of affronts: he exhibits himself as devoid of the sentiment of courage, which produces general security, and, indeed, as devoid of sensibility to reputation—sensibility, protectrix of all the virtues, and safeguard against all the vices.

In examining the progress of public opinion with regard to insults, it appears to me, generally speaking, to be good and useful; and

the successive changes which it has made in the practice of duels, have brought them more and more into conformity with the principle of utility. The public would do wrong, or, rather, its folly would be manifest, if, being the spectator of an insult, it immediately passed a decree of infamy against the party insulted. But this it does not do: this degree of infamy takes place only when the party insulted rebels against the laws of honour, and himself signs the decision of his degradation from manhood.

The public is in general* right in this system: the real wrong is on the side of the laws. *First wrong:* the allowing this anarchy to subsist with regard to insults, which has rendered a recurrence to this whimsical and mischievous method necessary. *Second wrong:* the having wished to oppose themselves to the practice of duelling — an imperfect, but the only remedy. *Third wrong:* the having opposed it, only by disproportioned and inefficacious means.

CHAPTER XV.

REMEDIES FOR OFFENCES AGAINST HONOUR.

WE shall begin with the methods of satisfaction for offended honour; the reasons which justify them will follow.

Offences against honour may be divided into three classes: Verbal insults — Corporal insults — Insulting threats. The punishment analogous to the offence ought to operate, at the same time, as a means of satisfaction for the party injured.

List of these Punishments.

1. Simple Admonition.
2. Reading of the sentence against the offender, by himself, in a loud voice.
3. The offender kneeling before the party injured.
4. Speech of humiliation which is prescribed to him.
5. Emblematical robes (with which he may be dressed in particular cases.)
6. Emblematical masks, with a snake's head in cases of fraud — with a Magpie's or a Parrot's head in cases of temerity.
7. The witnesses of the insult, summoned to be witnesses of the reparation.
8. The individuals whose good opinion is of importance to the offender, summoned to the execution of the sentence.
9. Publicity of the judgment, by the choice of the place, concourse of spectators, the printing, the placarding, the distribution of the sentence.
10. Banishment, more or less long, whether from the presence of the party injured, or from that of his friends. — For an insult offered in a public place, as a market, theatre, or church, banishment from these places.
11. For a corporal insult, similar infliction, either by the party injured, or, at his choice, by the hand of the executioner.
12. For an insult offered to a woman, the man might be muffled up in the headdress of a woman, and the like insult might be inflicted on him by the hand of a woman.

Many of these methods are new, and some of them may appear singular: but new methods are necessary, since experience has shown the insufficiency of the old ones; whilst, as to their apparent singularity, it is by this that they are adapted to their end, and designed, by their analogy, to transfer to the insolent offender the contempt which he wished to fix upon the innocent. These methods are numerous and varied, that they may correspond with the number and variety of offences of this kind — that they may be adapted to the gravity of the cases, and furnish suitable reparations to the different social distinctions; for it is not proper to treat in the same manner an insult offered to a common person and to a magistrate, to an ecclesiastic and to a military man, to a young and to an old person. All this parade of speeches, attitudes, emblems, forms, solemn or grotesque, according to the difference of the cases; in a word, these public satisfactions converted into shows, would furnish to the injured party actual pleasures, and pleasures of remembrance, which would compensate for the mortification of the insult.

Observe, that the injury having been caused by some mechanical means, it is proper that similar mechanical means should be employed in the reparation, otherwise it will not strike the imagination in the same manner, and will be incomplete.

Has the offender employed a certain kind of injury for turning the public contempt upon his adversary? it is proper to employ an analogous kind of injury to turn this contempt upon himself. The seat of t

* Does the public know the reason which it has for its opinion? Is it guided by the principle of utility, or by a mechanical imitation and an ill developed instinct? Does he who fights, act from an enlightened view of his own and the general interest? These are questions more curious than useful. The following observation may serve to resolve them. It is one thing to be guided by the presence of certain motives, it is another thing to perceive their influence. There is no action or judgment without motive, no effect without a cause. But in order to understand the influence which a motive has over us, it is necessary to know how to direct the mind upon itself, and to anatomize its thoughts: it is necessary to divide the mind as it were into two parts, of which the one is to be occupied in observing the other; a difficult operation, of which, from want of exercise, few persons are capable.

is in opinion: it is in opinion that the remedy must be found. The wounds of this lance of Telepheus can only be cured by the touch of the same lance: it is an emblem of the operations of justice in matters of honour. Has the mischief arisen from an affront? it is only by an affront that it can be repaired.

Let us trace the effect of a satisfaction of this kind. The party injured is reduced to a state of intolerable inferiority before his aggressor; can no longer meet him with security in the same place, and sees in the future only a prospect of repeated injuries; but immediately after the legal reparation, he regains what he had lost, he walks with security, erect, and acquires even a positive superiority over his adversary. How is this change produced? It is because he is no longer seen as a feeble and miserable being, who may be trampled under foot: the power of the magistrate is become his. No one will be tempted to repeat the insult of which the punishment has had so much eclât. His oppressor, who appeared for a moment to overtop him, has fallen from his car of triumph; the punishment he has undergone in the presence of so many witnesses, proves that he is not more to be feared than another man; and there remains nothing of his violence but the remembrance of its chastisement. What can the offended party desire more? If he had the strength of a gladiator, where would be the advantage?

If legislators had always properly applied this system of satisfactions, there would have been no duels, which have only been, and still are, a supplement to the insufficiency of the laws. In proportion as this void in legislation is filled up by measures suited to the protection of honour, the use of duels will diminish; and they will cease entirely, when these honorary satisfactions agree exactly with opinion, and are faithfully administered. In former times, duels have been employed as a means of decision in a great number of cases, in which it would be most highly ridiculous now to employ them. A lawyer, who should send a challenge to his antagonist in order to prove a title, or establish a right, would be esteemed a fool: in the twelfth century, this method would have been esteemed valid. Whence arises this change? From the same cause which has by degrees been operating in jurisprudence. Justice, by becoming enlightened, and establishing laws and forms of procedure, has offered methods of redress preferable to that of duelling.* The same cause will produce the same effects. So soon as the law shall offer a remedy for offences against honour, there will be no temptation to have recourse to an equivocal and dangerous proceeding. Does any one love suffering and death? Certainly not. This sentiment is equally a stranger to the heart of the coward and of the hero. It is the silence of the laws — it is the neglect of justice, which obliges the wise man to protect himself by this sad, but sole resource.

In order that honorary satisfaction may have all the extent and force of which it is susceptible, the definition of offences against honour should have sufficient latitude to embrace them all. It should follow public opinion step by step — should be its faithful interpreter; every thing which it regards as an attack upon honour should be regarded as such. A word, a gesture, a look, is either of them regarded by the public as an insult. This word, this gesture, this look, should suffice, in justice, to constitute it an offence. The intention to injure constitutes the injury. Every thing directed toward a man, to express or to attract contempt towards him, is an insult, and ought to have its reparation.

It is said that these insulting signs, doubtful in their nature, fugitive, and often imaginary, would be too difficult to be described, and that some suspicious characters, seeing an insult where there was none, would cause the innocent to undergo undeserved punishments.

This danger is null, because the line of demarcation is easily traced between real and imaginary injury. It is sufficient, on the requisition of the complainant, to interrogate the defendant respecting his intention, "Did you design, by what you have said or done, to mark such an one with contempt?" If he deny it, his answer, true or false, is sufficient to clear the honour of him who has been, or believes himself to have been, offended. For, has the injury itself been only slightly equivocal? to deny it, is to have recourse to a lie, to acknowledge his fault, to disclose his fear and his weakness — in a word, it is to perform an act of inferiority, and to humiliate himself before his adversary.

In forming the catalogue of offences which possess the character of insults, there are necessary exceptions: care must be taken not to include in the decree of proscription useful acts of public censure — the exercise of the power of the popular sanction. The authority necessary for correction and reprimand must be reserved to friends and superiors. The freedom of history and of criticism must be secured.

CHAPTER XVI.

OF VINDICTIVE SATISFACTION.

THIS subject does not demand many particular rules — every species of satisfaction

* It was in 1305 that Phillippe le Bel abolished duelling in civil cases. He had rendered the parliament sedentary at Paris, and done much for the establishment of judicial order.

naturally bringing in its train a punishment to the defendant, a pleasure of vengeance for the party injured.

This pleasure is a gain: it recals the riddle of Samson; it is the sweet which comes out of the strong; it is the honey gathered from the carcase of the lion. Produced without expense, net result of an operation necessary on other accounts, it is an enjoyment to be cultivated as well as any other; for the pleasure of vengeance, considered abstractedly, is, like every other pleasure, only good in itself. It is innocent so long as it is confined within the limits of the laws; it becomes criminal at the moment it breaks them. It is not vengeance, which ought to be regarded as the most malignant and most dangerous passion of the human heart; it is antipathy, it is intolerance: these are the enmities of pride, of prejudice, of religion, and of politics. In a word, that enmity is not dangerous which has foundation, but that which is without a legitimate cause.

Useful to the individual, this motive is also useful to the public, or, to speak more correctly, necessary. It is this vindictive satisfaction which often unties the tongue of the witnesses; it is this which generally animates the breast of the accuser, and engages him in the service of justice, notwithstanding the trouble, the expenses, the enmities, to which it exposes him; it is this which overcomes the public pity in the punishment of the guilty. Take away this spring, the machinery of the laws will no longer move, or at least the tribunals will only obtain services for money—a means which is not only burthensome to society, but also exposed to very strong objections.

Some commonplace moralists, always the dupes of words, cannot understand this truth. The desire of vengeance is odious; all satisfaction drawn from this source is vicious; forgiveness of injuries is the noblest of virtues. Doubtless, implacable characters, whom no satisfaction can soften, are hateful, and ought to be so. The forgiveness of injuries is a virtue necessary to humanity; but it is only a virtue when justice has done its work, when it has furnished or refused a satisfaction. Before this, to forgive injuries is to invite their perpetration—is to be, not the friend, but the enemy of society. What could wickedness desire more, than an arrangement by which offences should be always followed by pardon?

What, then, ought to be done, with the intention of yielding this vindictive satisfaction? It is proper to do every thing which justice requires to answer the ends of the other satisfactions, and for the punishment of the offence: nothing more is required. The least excess set apart for this object would be an evil in pure waste. Inflict the punishment which is deserved, and the injured party may draw from it the degree of enjoyment which his situation yields, and of which his nature is susceptible.

However, without adding any thing to the gravity of the punishment on this particular account, certain modifications may be given to it, in accordance with what may be supposed the feelings of the injured party, regard being had to his situation and the species of offence. Examples of this kind have been exhibited in the preceding chapter; others will be shown in connexion with the choice of punishments.

CHAPTER XVII.

OF SUBSTITUTIVE SATISFACTION, OR AT THE EXPENSE OF A THIRD PARTY.

IN the most common case, it is upon the author of the evil that the expense of satisfaction ought to be fixed. Why? because, when fixed in this manner, it tends, in quality of punishment, to prevent the evil, by diminishing the frequency of the offence: fixed upon another individual, it would not have this effect.

Does this reason no longer exist with regard to the first respondent? does it apply to another in default of the first? The law of responsibility ought to be modified in consequence; or, in other terms, a third person ought to be called upon to pay, instead of the author of the mischief, when he cannot furnish the satisfaction, and when the obligation imposed upon this third party tends to prevent the offence.

This may happen in the following cases:—

1. Responsibility of a master for his servant.
2. ..... a guardian for his ward.
3. ..... a father for his children.
4. ..... a mother for her children, in quality of tutor.
5. ..... a husband for his wife.
6. ..... an innocent person, who profits by the offence.

1. *Responsibility of a Master for his Servant.*

This responsibility is founded upon two reasons; the one of security, the other of equality. The obligation imposed upon the master acts as a punishment, and diminishes the chance of similar misfortunes. He is interested in knowing the character and watching over the conduct of those for whom he is answerable. The law makes him an inspector of police, a domestic magistrate, by rendering him answerable for their imprudence.

Besides, the condition of master almost necessarily supposes a certain fortune; the circumstance of being the party injured, the

object of the misfortune, supposes no such thing: when there is an inevitable evil to be borne by one of two persons, it is most desirable that its weight should be thrown upon him who is best able to bear it.

This responsibility may have certain inconveniences; but if it did not exist, the inconveniences would be still greater. Did a master wish to commit waste on the lands of his neighbour, — to expose him to some accident, — to wreak his vengeance on him, — to make him live in continual uneasiness, he need only choose some vicious servants, whom he might instigate to serve his passions and his enmities, without commanding any thing, without being their accomplice, or without it being possible to find proofs of it; always ready to urge them on, or to disavow them, he might make them the instruments of his designs, and run no risk himself.* By showing them a little more than ordinary confidence— by taking advantage of their attachment and devotedness, of their servile vanity, there is nothing which he may not obtain by general instigations, without exposing himself to the danger of directing any thing in particular; and he would rejoice with impunity over the evil which he had done by the hand of others. "Unhappy that I am!" cried Henry the Second, one day, vexed with the haughtiness of an insolent prelate: "what! so many servants who boast of their zeal, and not one who will avenge me?" The effect of this imprudent or criminal apostrophe was the murder of the archbishop.

But that which essentially diminishes for the master the danger of his responsibility, is the responsibility of the servant. The real author of the mischief, according to circumstances, ought to be the first to bear its disagreeable consequences, as far as he is able, that the negligent or vicious servant may not be able coolly to say, when doing mischief, "It is my master's affair, and not mine."

Besides, the responsibility of the master is not always the same: it ought to vary according to many circumstances, which ought to be examined with attention.

The first thing to be considered is the degree of connexion which subsists between the master and the servant. Is he a day-labourer, or a man engaged by the year? — a workman out of doors, or one dwelling in the house? — an apprentice or a slave? It is clear, that the stronger the connexion is, the more his responsibility ought to be increased. An agent is less dependent upon his principal than a lackey upon his master.

The second thing to be considered is the nature of the work on which the servant is employed. The presumptions against the master are less strong, with regard to work in which his interest would be liable to suffer from the fault of his agents, and they would be stronger in the contrary case. In the first case, the master has already a sufficient motive for exercising his superintendence: in the second, he cannot have this motive; the law must supply it.

3. The responsibility of the master is much greater, if the mischief have happened on account of his service, or during such service; because it is to be presumed that he may have directed it, that he ought to have foreseen the event, and that he might have watched over his servants at this time, more easily than during the hours of their liberty.

There is one case which seems exceedingly to reduce, even if it does not altogether destroy, the strongest reason for responsibility, when the mischief has for its cause a serious offence, accompanied consequently by a proportional punishment. If my servant, for example, having a personal quarrel with my neighbour, set fire to his granaries, ought I to be answerable for a damage that I could not hinder? If the madman do not dread being hanged, will he dread being driven from my service?

Such are the presumptions which serve as a foundation for responsibility: presumption of negligence on the part of the master, presumption of superior wealth on the part of the master above the party injured, &c.; but it ought not to be forgotten, that these presumptions are nothing, when they are contradicted by facts. An accident, for example, has happened by the overturning of a carriage. Nothing is known of the party injured. It is presumed that he is in a situation to receive an indemnity from its owner, who, it is presumed, is in a condition to bear the loss. But what becomes of this presumption, when it is known that this owner is a poor farmer, and the party injured a wealthy noble? that the first would be ruined if he had to pay the indemnity, which is of little consequence to the other. Hence presumptions ought to guide, but they ought never to enslave. The legislator ought to consult them in establishing general rules, but he ought to allow the judge to modify their application according to individual cases.

The general rule establishes the responsibility of the master; but the judge, according to the nature of the circumstances, should change this arrangement, and cause the weight of the loss to fall upon the true author of the evil.

By leaving to the judge the greatest lati-

* There are many methods of doing evil by means of another, without any trace of complicity. I have heard it said by a French counsellor, that when the parliaments wished to save a guilty person, they designedly chose some unskilful person as a reporter, hoping that his unskilfulness would give birth to some means of nullity. This was truly employing ingenuity in the service of prevarication.

tude with respect to this reparation, the greatest abuse which can result will be the occasional introduction of the inconvenience which the general rule would necessarily produce, on whichever side it may be fixed. If the judge favour the author of the mischief on one occasion, and the master on another, he who is improperly treated by the free choice of the judge, is not worse off than if he had been thus improperly treated by the inflexible choice of the law.

In our systems of jurisprudence, these modifications have not been observed. The burden of the entire loss is thrown sometimes upon the servant, sometimes upon the master; from which it results, that sometimes security, and at other times equality, have been neglected, whilst the one or the other ought to have been preferred, according to the nature of the case.

2. *Responsibility of a Guardian for his Ward.*

The ward is not among the number of the goods of the guardian: he is, on the contrary, among the number of his charges. Has the pupil sufficient fortune to furnish the satisfaction? it is not necessary that another should pay it for him. Has he not the means? the guardianship is in this case too weighty a burthen to be surcharged with factitious responsibility. All that ought to be done is to attach to the negligence of the guardian, proved or even presumed, a fine, larger or smaller according to the nature of the proofs, but which ought not to exceed the expense of satisfaction to the party injured.

3. *Responsibility of a Father for his Children.*

If a master ought to be responsible for the faults of his servants, much more ought a father to be so for the faults of his children. Is it possible, and ought the master to watch over those who depend upon him? It is a much more pressing duty upon a father, and much more easy to be fulfilled: he exercises over them, not only the authority of a domestic magistrate, but he possesses all the ascendancy of affection: he is not only the guardian of their physical existence; he may command all the sentiments of their souls. The master may not have been able to restrain or to watch a servant who announces dangerous dispositions; but the father, who might have fashioned at his own will the character and the habits of his children, may be considered the author of all the dispositions which they manifest. Are they depraved? it is almost always the effect of his negligence or of his vices. He ought, therefore, to bear the consequences of an evil which he ought to have prevented.

If it be necessary to add a new reason after so strong a one, it may be said that the children, with the exception of the rights which belong to them as sentient beings, are part of a man's property, and ought to be considered as such. He who enjoys the advantages of the possession, ought to bear its inconveniences: the good much more than compensates for the evil. It would be very singular, if the loss or destruction occasioned by children should be borne by an individual who knows nothing of them, but their malice or their imprudence, rather than by him who finds in them the greatest source of his happiness, and may indemnify himself by a thousand hopes for the actual cares of their education.*

But this responsibility has a natural limit. The majority of a son, or the marriage of a daughter, putting an end to the authority of the father, causes the responsibility which the law throws upon a father to cease. He ought no longer to bear the punishment of an action which he has no longer the power to hinder.

To perpetuate during his whole life the responsibility of a father, as the author of the vicious dispositions of his children, would be cruel and unjust. For, in the first place, it is not true that all the vices of an adult may be attributed to the defects of his education: different causes of corruption, after the period of independence, may triumph over the most virtuous education; and besides this, the condition of a father is sufficiently unhappy, when the evil dispositions of a child, arrived at the age of manhood, have broken out into crime. After all that he has already suffered in the bosom of his family, the pain which he experiences from the misconduct or dishonour of his child, is a species of punishment which nature itself inflicts upon him, and which it is not necessary that the law should aggravate. This would be to spread poison over his wounds, without hope either of repairing the past, or guarding against the future. Those who would justify this barbarous jurisprudence by the example of the Chinese, have not recollected that the authority of the father in that country ceases only with his life, and that it is just that his responsibility should continue as long as his power.

4. *Responsibility of the Mother for her Child.*

The obligation of the mother, in similar cases, is naturally regulated by the rights she possesses.

Is the father still alive? the responsibility of the mother, as well as her power, remain absorbed in that of her husband. Is he deceased? as she takes in hand the reins of domestic government, she becomes responsible for those who are subject to her empire.

* It was a maxim of the Roman law — *Qui sentit commodum sentire debet et onus.*

5. *Responsibility of the Husband for his Wife.*

This case is as simple as the preceding. The obligation of the husband depends on his rights; the administration of their goods belongs to him alone: unless the husband were responsible, the party injured would be without remedy.

As to the rest, the order generally established is supposed here: that order so necessary to the peace of families, the education of children, and the maintenance of manners; that order, so ancient and so universal, which places the wife under the authority of the husband. As he is her head and guardian, he answers for her before the law: he is even charged with a more delicate responsibility before the tribunal of public opinion; but this observation does not belong to our present subject.

6. *Responsibility of an innocent Person who has profited by the Offence.*

It often happens that a person, without having had any share in an offence, derives from it a sensible profit. Is it not proper that this person should be called upon to indemnify the party injured, if the guilty party cannot be found, or if he be not able to furnish an indemnity?

This proceeding would be conformable to the principles we have laid down, — in the first place, with regard to *security;* for he may have been an accomplice without its having been proved: also with regard to *equality;* for it is more desirable that one person should be simply deprived of a gain, rather than that another should suffer an equal loss.

A few examples will suffice to explain this subject.

By piercing a dike, the land of one party has been deprived of the benefit of the water which he formerly possessed, and it has been given to another. He who comes into the enjoyment of this unexpected advantage, owes at least a part of his gain to him who has suffered loss.

A tenant in possession, whose estate passes to a stranger by entail, has been killed, and has left a family in want. The tenant in tail, who thus comes into a premature enjoyment of the estate, ought to be accountable for a certain satisfaction to the family of the deceased.

A benefice has become vacant, because its possessor has been killed, it matters not how. If he have left a wife and children in poverty, the successor owes them an indemnity proportioned to their necessity, and the enjoyment they had anticipated.*

* It is a common maxim — *Neminem oportet alterius incommodo locupletiorem fieri.*

CHAPTER XVIII.

OF SUBSIDIARY SATISFACTION AT THE EXPENSE OF THE PUBLIC TREASURE.

THE best source from which satisfaction can be taken, is the property of the delinquent, because it fulfils, as we have seen, with a superior degree of suitableness, the functions of a punishment.

But if the delinquent have no fortune, ought the injured individual to remain without satisfaction? No: for the reasons which we have already set down, satisfaction is almost as necessary as punishment. It ought to be made at the expense of the public treasure, because it is an object of public benefit; the security of all is concerned. The obligation upon the public treasure to provide satisfaction, is founded upon a reason which has the clearness of an axiom. A pecuniary burthen, divided among the whole number of individuals, is nothing for each one in comparison with what it would be for each one or a small number.

Is insurance useful in commercial enterprises? it would be no less so in the great social enterprise, where the associates find themselves united by a train of chances, without knowing each other, without choice, without the power of avoiding it, or guarding themselves by their prudence against the multitude of snares which they may mutually prepare. Calamities which arise from crimes, are not less real evils than those which arise from natural causes. If the sleep of the master be sweeter in a house insured against fire, it would be still more so if he were insured against theft. Abstraction made of its abuses, too great extent could hardly be given to a method so perfectible and so ingenious, which renders real losses so light, and which gives so much security against eventual evils.

However, all insurances are exposed to great abuses from fraud or negligence: fraud on the part of those who, in order to obtain unlawful indemnities, feign or exaggerate their losses; negligence, whether on the part of the assurers, who do not take all necessary precautions, or on the part of the assured, who use less vigilance in guarding against losses which are not to be borne by them.

In a system of satisfactions at the expense of the public treasure, there is reason to fear —

1. A secret connivance between the party pretending to be hurt, and the pretended author of the offence, in order to obtain an undue indemnity.

2. Too great security on the part of individuals, who, having no longer to fear the same consequences of crimes, would not make the same efforts to prevent them.

This second danger is little to be dreaded. No one would neglect his actual possessions, a good certain and present, with the hope of recovering, in case of loss, only an equivalent for the thing lost, and even at the most an equivalent. To this let it be added, that this recovery would not be obtained without care and expense; that there must be a transient privation; that he must bear the burthen of prosecution, and act the always disagreeable part of an accuser; and that, after all, under the best system of procedure, success is still doubtful.

There would remain, therefore, sufficient motives for each individual to watch his property, and not to encourage offences by his negligence.

On the side of fraud, the danger is much greater. It cannot be prevented but by detailed precautions, which will be explained elsewhere. As examples, it will be sufficient to point out two opposite cases; one in which the utility of the remedy exceeds the danger of the abuse, the other in which the danger of the abuse exceeds the utility of the remedy.

When the damage is occasioned by an offence, the punishment of which is weighty, and its author is judicially convicted of the crime, it seems that fraud is very difficult. All that the impostor, who pretends to have been hurt, can do to procure an accomplice, is to give him a part of the profits of the fraud: but unless the clearest principles of proportion between crimes and punishments have been neglected, the punishment which the accomplice will have to undergo, would be more than an equivalent to the total profit of the fraud.

Observe, the offender ought to be convicted before the satisfaction is awarded: without this precaution, the public treasure would be pillaged. Nothing would be more common than the tale of imaginary thefts; of pretended robberies committed in a clandestine manner, or during the darkness of the night, or by unknown persons who have escaped. But when it is necessary to have apprehended the guilty, complicity is not easy. The part which it would be necessary to act, is not one of those which is easily performed, in as much as, besides the certainty of punishment for the individual charged with the pretended offence, there would also be a particular punishment in case the imposture should be detected—a punishment to be shared by the two accomplices; and if it be considered how difficult it is to invent a plausible story of an offence altogether imaginary, it may be believed that such frauds would be very rare, if they ever happened.

The danger most to be apprehended is the exaggeration of a loss resulting from a real offence. But it is necessary that the offence should be susceptible of this species of falsehood, and this is a case sufficiently rare.

It appears, therefore, that it may be laid down as a maxim, that in all cases in which the punishment of an offence is weighty, it need not be feared that an imaginary offender will be willing to charge himself with an offence for a doubtful profit.

But, for the opposite reason, when the mischief results from an offence of which the punishment is slight or none, the danger of abuse would be at its height if the public treasure were responsible for it. The insolvability of a debtor is an example. Where is the beggar who would not be trusted, if the public were security for him? what treasury would be able to pay every creditor whose debtors did not actually pay them? and how many false debts would it not be possible easily to suppose?

This indemnification would not only be abusive: it is unnecessary; since, in the transactions of commerce, the risk of loss enters into the price of merchandise, or the interest of money: if the merchant were sure never to lose, he would sell at a lower price; hence, to seek from the public an indemnification for a loss which had been compensated for beforehand, would be to seek to be paid twice over.*

There are other cases in which satisfaction ought to be made at the public expense.

1. Cases of physical calamity, such as inundations, fires, &c. Aids granted by the state in such cases, are not only founded upon the principle, that the weight of the evil, divided among all, becomes more light; they rest also upon this other, that the state, as protector of the national wealth, is interested in preventing the deterioration of the national domain, and ought to re-establish the means of re-production in those parts which have suffered. Such were what have been called the liberalities of Frederick the Great to those provinces which had been desolated by certain calamities: they were acts of prudence and preservation.

2. Losses and misfortunes, the consequences of hostilities. Those who have been exposed to the invasions of the enemy have a right so much the more particular to a public indemnification, as they may be considered as having sustained the attack which threatened all parties, as being, by their situation, the point the most exposed for the common defence.

* A voluntary subscription, a bank of insurance destined to reimburse losing creditors, might be advantageous, without its being proper for the administrators of the public funds to institute such an establishment. The public funds being the product of constraint, ought to be managed with the greatest economy.

3. Evils resulting from unblameable errors of the ministers of justice. An error in justice is already, by itself, a subject of grief; but that this error, once known, should not be repaired by proportional indemnification, is an overturning of the social order. Ought not the public to follow the rules of equity which are imposed on individuals? is it not shameful that it should employ its power in severely exacting what is due to itself, and should refuse to restore what it owes? But this obligation is so evident, that it becomes obscure by endeavouring to prove it.

4. Responsibility of a community for an offence of violence, committed in a public place in its territory. It is not properly the public treasure which ought to be employed in this case; it is the funds of the district or province, which ought to be taxed for the reparation of a negligence of police.

In case of competition, the interests of an individual ought to have place before those of the revenue: what is due to the injured party, on account of satisfaction, ought to be paid in preference to what is due to the public treasure on account of fine. Ordinary jurisprudence does not decide thus, but it is thus that reason decides. The loss suffered by an individual is an evil felt; the profit to the revenue is a good not felt by any person. What is paid by the offender as a fine, is a punishment, and nothing more; what he pays as a satisfaction is also a punishment, and a punishment even more than ordinarily strong, besides this, it is a satisfaction for the party injured; that is to say, a good. When I pay to the revenue, a creature of reason with whom I have no quarrel, I feel only the same regret for the loss as I should do had I dropt the sum into a well: when I pay it to my adversary, when I am thus obliged to confer a benefit on him whom I wished to injure, there is connected with the payment a degree of humiliation, which gives to the punishment thus inflicted the most desirable character.

PART II.—RATIONALE OF PUNISHMENT.

ADVERTISEMENT.

THE following account is given by M. Dumont of his labours with respect to the two volumes published by him at Paris in 1811, under the title of *Théorie des Peines et des Récompenses*. Of this work, three editions have been printed in France, and one in England.

"When I published in Paris, in 1802, *Les Traités de Legislation Civile et Pénale*, in three volumes, I announced other works of the same kind, which I had, in the same manner, extracted from the manuscripts of Mr. Bentham, but which were not then ready for the press.

"Success has encouraged my labours: three thousand copies were distributed more rapidly than I had dared to hope would be the case with the first work of a foreign author, but little known upon the continent. I have reason also to think that all recent as this work is, it has not been without its influence, since it has been frequently quoted in many official compositions relating to civil or criminal codes.

"But circumstances, which prevented these new volumes from entering upon the same course of circulation as the preceding, have sometimes cooled my zeal, and I should willingly have resigned the task I had imposed upon myself, if the author would have undertaken it himself. Unhappily, he is as little disposed so to do as ever; and if these works do not appear in the French dress which I have given them, it is most probable that they will remain shut up in his cabinet.

"They have lain there thirty years: the manuscripts from which I have extracted *La Théorie des Peines*, were written in 1775. Those which have supplied me with *La Théorie des Récompenses*, are a little later: they were not thrown aside as useless, but laid aside as rough-hewn materials, which might at a future day be polished, and form part of a general system of legislation—or as studies which the author had made for his own use.

"These manuscripts, though much more voluminous than the work I have presented to the public, are very incomplete. They offered to me often different essays upon the same subject, of which it was necessary to take the substance and unite them into one. In some chapters I had nothing but marginal notes to direct me. For the fourth book of *La Théorie des Peines*, I was obliged to col-

* In preparing the *Rationale of Punishment* for its appearance before the English public, the Editor has taken the volume entitled Théorie des Peines, published by M. Dumont, as the groundwork of his labours; but having availed himself, wherever he could, of the original manuscripts, his will in many instances not be found a literal translation of M. Dumont's work.

lect and prepare a variety of fragments. The discussion upon the punishment of death was unfinished. At one time, the author intended to treat of this subject anew, but this intention has not been carried into effect. He had prepared nothing upon transportation — nothing upon Penitentiaries. The idea of the Panopticon was as yet unformed. I have derived the foundations of these two important chapters from a work of Mr. Bentham's, since published (*Letters to Lord Pelham, &c. &c.*) I have taken all that suited my general method of treating the subject, by separating it from all controversy.

"After these explanations, it will not be matter of surprise, if the facts and allusions do not always accord with the date of the original manuscripts. I have freely used the rights of an Editor: according to the nature of the text, and the occasion, I have translated, commented, abridged, or supplied, but it need hardly be repeated, after what was said in the preliminary discourse to the former publication, that this co-operation on my part has had reference to the details only, and ought not to diminish the confidence of the readers; it is not my work that I present to them: it is, as faithfully as the nature of things will permit, the work of Mr. Bentham.

"It has been said, that these additions, these changes, should bear some distinctive mark; but though this species of fidelity is desirable, it is impossible. It is only necessary to imagine what is the labour of finishing a first sketch — of completing unfinished and unreviewed manuscripts, sometimes consisting of fragments and simple notes, in order to comprehend, that it required a continued freedom, a species of imperceptible infusion, if I may so speak, which it is scarcely possible for the individual himself to remember. This is, however, of no importance. It may be believed that the author has not found his ideas disfigured or falsified, since he has continued to entrust me with his papers.

"I must, however, declare, that he has altogether refused to share my labour, and that he will not, in any manner, be responsible for it. As he has never been satisfied with a first attempt, and has never published anything which he has not written at least twice over, he has foreseen that the revision of so old an essay would lead him too far away from, and be incompatible with, his present engagements. In this manner he has justified his refusal; but he has authorised me to add, that any change which he might make would bear only upon the *form;* as respects the *principles*, his opinions have not changed: on the contrary, time and reflection have given them additional strength.

"That Mr. Bentham, who is too particular about his productions, should not deem these worthy of the public notice, will not astonish those who know all that he requires of himself, and the ideas which he has formed for himself of a complete work.

"A perfect book would be that which should render useless all which had been written in time past, or that could be written in future time, upon the same subject. With respect to the second condition, it is not possible to decide when it is accomplished, without pretending to measure the power of the human mind; with respect to the first, we can more easily decide by a comparison with the works which have gone before.

"This comparison has supported me against a just distrust of my own powers. After the author had refused me all assistance, and had expressed his doubts upon the merit of his own work, I was led to reperuse and reconsider the most celebrated works upon this subject, and even those which had been less distinguished; and then I could hesitate no longer.

"I was tempted, at one time, to collect every thing dispersed through *L'Esprit des Lois* upon the subject of Rewards and Punishments. This collection would have been contained in ten or a dozen pages. By thus collecting the whole together, it would have been possible to judge of the correctness of that expression of D'Alembert, so often repeated in France, that *Montesquieu had said all, that he had abridged all, because he had seen all.* Among a multitude of vague and undefined thoughts upon these subjects, of which some are erroneous, there are certainly some which are judicious and profound, as in every thing we possess of this illustrious writer. But he has not developed the Rationale of Rewards and Punishments, — indeed, this was not his design, and nothing would be more unjust than to criticise him for not having done what he did not intend to perform.

"Beccaria has done more: he first examined the efficacy of punishments, by considering their effect upon the human heart; by calculating the force of the motives by which individuals are impelled to the commission of crimes; and of those opposite motives which the law ought to present. This species of analytical merit was, however, less the cause of his great success, than the courage with which he attacked established errors, and that eloquent humanity which spreads so lively an interest over his work; but after this, I scruple not to say, that he is destitute of method, that he is not directed by any general principle, that he only glances at the most important questions, that he carefully shuns all practical discussions in which it would have been evident that he was unacquainted with the science of Jurisprudence. He announces

two distinct objects — crimes and punishments; he adds to these, occasionally, Procedure; and these three vast subjects with difficulty furnish out matter for one little volume.

"After Montesquieu and Beccaria, we may leave in peace a whole library of books, more or less valuable, but which are not distinguished by any great character of originality; not but that we should find in them correct and judicious views, interesting facts, valuable criticisms upon laws, many of which no longer exist, and to the disappearance of which these works have contributed. I intend not here to enter in detail either upon their criticism or eulogium. It is enough for me to observe, that none have laid down the Rationale of Rewards and Punishments, or could be employed as a general guide.

"In the volumes formerly published, the Rationale of Punishment was only sketched out — a general map only was given of the department of Criminal Law, of which this work exhibits the topography.

"To prevent frequent reference, and to render this work complete in itself, I have borrowed some chapters from the preceding work, making considerable additions to them, and giving them a different form.

"At the risk, however, of inspiring my readers with a prejudice unfavourable to my work, I must acknowledge that its object, how important soever it may be in relation to its consequences, is any thing but interesting in its nature. I have been sensible of this during the progress of my labour, and I have not completed it without having often to conquer myself. A philosophical interest alone must suffice; the descriptions of punishments, and the examination of punishments, which follow each other without cessation in a didactic order, do not allow of a variety of style, do not present any pictures upon which the imagination can repose with pleasure.

"'Felices ditant hæc ornamenta libellos,
Non est conveniens luctibus ille color.'

"Happily, the subject of Rewards, by its novelty, and by the ideas of virtues, talents, and services, which it causes to pass in review, will conduct the readers by more agreeable routes. The Tartarus and Elysium o legislation, so to speak, are here disclosed; but in entering into this Tartarus, it is only to lighten its torments, and we are careful not to engrave upon its portal the terrible inscription of the poet,

"'*Lasciate speranza, voi ch' entrate.*'"

BOOK I.

GENERAL PRINCIPLES.

CHAPTER I.

DEFINITIONS AND DISTINCTIONS.

To afford a clear apprehension of the subject of the following work, which subject is Punishment, it is necessary that what punishment *is*, and what punishment *is not*, should be clearly understood. For this purpose it will be proper to distinguish it from those objects with which it is in danger of being confounded, and also to point out the different shapes which it may assume.

Punishment, whatever shape it may assume, is an evil. The matter of *evil*, therefore, is the sort of matter here in question: the matter of evil in almost all the shapes of which it is susceptible. In considering this matter, two objects, constant accompaniments one to the other, will require to be distinguished, viz. 1. The act by which the evil is considered as being produced; and, 2. What is considered as being the result of that same act, the evil itself which is thus produced.

The English language affords but one single-worded appellative in common use for designating both these objects, viz. *Punishment.**

Punishment may be defined — an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done, or omitted. The propriety of this definition will appear, and its use be manifested, by taking it to pieces, and examining its several constituent parts.

Punishment, then, is an *evil* — that is, a physical evil; either a pain, or a loss of plea-

* In the French, there exists for the designation of the act one name, viz. *punition — acte de punition;* and for the designation of the evil, the result or produce of that act, another name, viz. *peine.*

But though exempt from the ambiguity by which, as above, the English language is deteriorated, the French labours under another. By the word *peine*, the result is indeed secured against being confounded with the act that caused it. But, on the other hand, the use of this word is not confined to the case in which the object designated by it is the result of an act emanating from the will of a sentient being; it is at least as frequently employed to designate the object itself, without regard to the cause by which it has been produced.

Besides being too broad in one direction, the import of it is too narrow in another. It is synonymous to, and not more than co-extensive with, *douleur:* it fails of including that modification of evil which is of the purely negative cast, consisting of the absence, certain, or more or less probable, of this or that modification of pleasure.

sure, or else of that situation or condition of the party affected, which is the immediate cause of such pain or loss of pleasure. It is an evil resulting from the *direct* intention of another. It is not punishment, if it be obliquely intentional on the part of the person from whose agency it results, but an evil of some other nature, but which, however, is not in all cases distinguished by a specific name.

It is an evil resulting to a person from the direct intention of another, *on account of* some act that has been done or omitted. An evil resulting to an individual, although it be from the direct intention of another, if it be not on account of some act that has been done or omitted, is not a punishment. If, out of *wantonness*, for the sake of *sport*, or out of *ill-will*, resulting from an *antipathy* you entertain against a man's person, without having any particular act of his to ground it upon, you do him a mischief, the evil produced in this case is what nobody would understand to come under the name of punishment.

But so it be on account of some act that has been done, it matters not by whom the act was done. The most common case is for the act to have been done by the same person by whom the evil is suffered. But the evil may light upon a different person, and still bear the name of punishment. In such case it may be styled punishment *in alienam personam*, in contradistinction to the more common case in which it may be styled punishment *in propriam personam*. Whether the act be ultimately or only mediately intentional, it may, consistently enough with common usage, bear the name of punishment; though, according as it was in the one or other way that the intention happened to regard it, the act will assume a different name, as we shall have occasion to mention presently.

It must be on account of some act that at least *appears* to have been done; but whether such an act as appears to have been done, or any act actually was done, is not material.

By the denomination thus given to the act, by the word punishment, taken by itself, no limitation is put to the description of the person of the agent; but on the occasion of the present work, this person is all along considered as a person invested for this purpose with the authority of the state; a legislator appointing the species of evil to be inflicted in a species of case; or a judge appointing the individual lot of evil to be inflicted in this or that individual case.

Vengeance, antipathy, amendment, disablement, determent, self-defence, self-preservation, safe custody, restraint, compulsion, torture, compensation in the sense in which it means a particular mode of satisfaction for injury or damage — burthen in any such phrase as that of imposition of a burthen, and taxation: by all these several words, ideas are presented which will require in each instance to be compared, and in most instances to be distinguished from the ideas presented by the word *punishment*.

Take whatever portion of the matter of evil is upon the carpet: whether the term punishment shall or shall not with propriety be applied, depends upon the position in which the actual result stands with reference to the time in which the *will* or intention of the agent acts.

Intention or unintentional: if intentional, directly or indirectly, or, to use another word, collaterally intentional; if directly, ultimately, or but mediately intentional; such are the modifications which the matter of evil may be considered as receiving, when considered in the character of an object to which the will or intention turns itself.

In some cases, the man in power, or some person or persons, having, as he supposes, received, at the hands of some person or other, evil in some shape or other, the object which he has in view, in the affliction of the evil in question, is an enjoyment of a certain kind, which he derives, or expects to derive, from the contemplation of the evil thus sustained. In this case, the act in question is termed an act of *vengeance*.

So far as this, and this alone, is his object, this evil thus produced is not only directly but ultimately intentional.

Whether in the character of a sole object, a result of this nature be a fit object for the man in power to propose to himself, is indeed a very important question, but one which has no place here: punishment, by being misapplied, is not the less punishment.

Laying out of the above case the supposed antecedent evil, you have no longer an act of vengeance, but an act performed for the mere gratification of *antipathy*. But by the supposition having for its author or agent the legislator or the judge, it is still not the less an act of punishment.

Of the cases in which the act productive of the evil, intentionally produced by the hand of power, is termed an act of punishment, the most common class is that which is composed of those in which, on the part of the agent, the evil thus produced is, though intentional, and even directly intentional, yet not ultimately, but only mediately intentional.

In this case, the ultimately intentional object — the object in relation to which the act of punishment is intended to minister in the character of a means to an end — may be either an act of the negative or the positive* cast.

When the act to which the punishment is

* To him who would understand what he hears or what he says, positive and negative are adjuncts; the use of which is not more necessary in electricity and galvanism than in law, and especially in penal law.

annexed is of the positive cast, the ultimately intentional object aimed at by the act of punishment is of the opposite cast; and so, when the offence is negative, the result, the production of which is aimed at by the punishment, is positive.

If the offence be of the positive cast, then come the following string of appellatives, expressive of the results, the production of which is in different ways aimed at, viz. 1. Amendment or reformation; 2. Disablement; 3. Determent; 4. Self-defence; 5. Self-preservation; 6. Safe custody; and 7. Restraint.

If the offence be of the negative cast, then comes another string of appellatives, expressive, as above, of the results aimed at, viz. 1. Compulsion or restraint; 2. Torture; 3. Compensation, in the sense in which it is equivalent to *satisfaction*, rendered in consideration of injury resulting from an offence, or in consideration of damage produced without intentional injury; 4. Taxation.

Whether the result aimed at be of the negative or positive cast, the terms, coercion, obligation, burthen, or the phrase *imposition* of a burthen, are competent to the designation of it.

Amendment, or reformation, and *disablement*, are words expressive of the result aimed at, in so far as the conduct of the supposed delinquent is concerned. In the case of *amendment* or *reformation*, the obnoxious act is regarded as being of such a nature, that by a single instance of its being committed, such a degree of disorder in the moral constitution is indicated, as requires a general change to remove it, and bring the patient to a state of ordinary purity.

Few, if any, offences of the negative class being to be found which exhibit any such degree of malignity, — the use of the terms amendment and reformation is nearly confined to the case when the obnoxious act, the prevention of which is the ultimate end of the punishment, is of the positive kind.

Disablement is a term for which, with reference to an act of the negative kind, a place is hardly to be found. Doing nothing is a sort of offence to which every man is so competent, that all endeavours on the part of government to disable a man from committing it may be set at defiance.

Determent is a result equally applicable to the case either of a positive or negative offence. It is moreover equally applicable to the situation of the already-punished delinquent, and that of other persons at large; nor does it involve, on the part of the punished delinquent, the supposition of any such general disorder as is implied by the words *amendment* or *reformation*.

When the ultimately intentional result is amendment or reformation, it is by the impression made by the action of the evil on the will of the offender that, in so far as it is produced, the result is considered as being produced. In this case, the *act of punishment* is also termed an act of *correction*.

When the ultimately intentional result is disablement, it is by depriving the offender of the power of committing obnoxious acts of the like description, that, in so far as it is produced, the result is considered as being produced. In this case, the course taken to produce the result may either be such the nature of which is to produce it only for a time, as is done by temporary imprisonment, confinement, or deportation; or for ever, as would in some cases be done by mutilation.

In so far as by the act of punishment exercised on the delinquent, other persons at large are considered as deterred from the commission of acts of the like obnoxious description, and the act of punishment is in consequence considered as endued with the quality of *determent;* it is by the impression made on the will of those persons, an impression made in this case not by the act itself, but by the idea of it, accompanied with the eventual expectation of a similar *evil*, as about to be eventually produced in their own instances, that the ultimately intentional result is considered as produced; and in this case it is also said to be produced by the *example*, or by the force of *example*.

Between self-defence and punishment, the relation is of this sort, viz. that to the same act which ministers to the one of those purposes, it may happen to minister to the other. This coincidence may have place in either of two ways: an act which has self-defence for its direct object and result, may have punishment for its collateral result; or an act which has punishment for its direct object and result, may have self-defence for its collateral result.

In repelling a personal assault, it may happen to an individual, intentionally or unintentionally, to inflict on the assailant a suffering by any amount greater than that of any which, by the assault, was inflicted on himself: if unintentionally, self-defence was not only the sole ultimately intentional, but the sole intentional result: but the suffering of the assailant, though not the collaterally intentional, was not in effect less truly the collateral result.

On the other hand, in inflicting punishment on a delinquent, it may happen to the *man in authority* to be exercising on his own behalf an act of *self-defence;* in regard to all offences, such as *rebellion* and *treason*, which have for their object or their effect the subversion of the government, or the weakening of its powers. But it is only in reference to such offences that an act of punishment can, with reference to the constituted authorities, be with propriety called an act of self-defence.

But if in lieu of the constituted authorities,

the members of the community at large be considered as the persons by whom the punishment is inflicted; then is all punishment an act of *self-defence*, in relation to the particular species of evil with which the offence thus punished is pregnant: an act tending to defend the community against offences of the sort in question, with their attendant evils, viz. by means of reformation, disablement, and determent, one or more of them as above.

In the signification of the word *self-defence*, it is implied that the evil against which the party is endeavouring to guard himself has, for its cause, an act done by some sentient being, with the intention of producing that same evil.

The word self-preservation is alike applicable, whatsoever be the source or quarter from which the evil is considered as about to come. In so far, therefore, as the act of punishment is with propriety capable of being termed an act of self-defence, it is, with the same propriety, capable of being termed an act of *self-preservation*.

Between safe custody and punishment, the relation is of this sort: — To one and the same operation, or factitious state of things, it may happen to be productive of both of these effects. But in the instance of the same individual, it is only to a limited degree that there can be a sufficient reason for making provision for both at the same time.

To a considerable extent, imprisonment with propriety may be, and every where is applied, under the name and to the purpose of punishment. In this case, safe custody is in part the same thing with the intended punishment itself; in part, a concomitant necessary to the existence and continuance of whatsoever inflictions it may be deemed proper to add to those which are inseparable from the safe custody itself.

But in another case, imprisonment, or an infliction of the same name, at least, as that which is employed as above, for the purpose of punishment, is to a great extent administered ultimately for the purpose of eventual forthcomingness, and mediately for the purpose of safe custody, though no such thing as punishment is, or, at least, ought to be intended, because no ground for punishment has as yet been, and perhaps never may be, established.

Between restraint and punishment, the relation is of this sort. In some shape or other, restraint is the *directly* intentional result of every prohibitive law. The evil, whatever it be, that constitutes an inseparable accompaniment of the state thus denominated, is a collaterally intentional result of that same law. The evil of the restraint may be very moderate; but still, by every general prohibitive law, evil in some shape or other, in some quantity or other, must come.

At the same time, restraint is, in a great variety of shapes, capable of being employed in the character of a punishment. As a punishment, restraint is not incapable of being employed for the purpose of securing submission to restraint. But in this case, the coincidence is but verbal, and arises from the generality of the word restraint. In the character of a punishment, we cannot employ the restraint collaterally resulting from the negative act, the production of which is the object of the prohibition in the character of the eventual punishment, to secure obedience to that same prohibitive law. To prevent a man from stealing, a law threatening to prevent him from stealing, would be but an indifferent resource. To secure, by means of eventual punishment, restraint in this shape, you must employ restraint in some other shape; for example, the restraint attached to imprisonment.

Between compulsion and punishment, the relation is of this sort. In the case of compulsion, as in the case of restraint, the act in question is the act which is regarded as the efficient cause of the evil, the prevention of which is the ultimate object of the act of punishment. What *restraint* is, in the case when the act in question is of the positive cast, *compulsion* is, in the case when the act is of the negative cast.

Between torture and punishment, the relation is of this sort. The term torture is employed, and perhaps with nearly equal frequency, in two different senses. In its most extended sense, it is employed to designate pain, especially pain of body, when considered as being intense in its degree, and this without reference to the cause by which it is produced.

In its more restricted sense, being that in which it is most apt to be employed, when considered as the result of law, it is employed to signify pain of body in its degree intense as above, employed in due course of law, or, at any rate, by the hand of power, in the character of an instrument of compulsion.

But the account given of it, when employed in this sense, wants much, as yet, of being complete. The compulsion, or constraint, may be produced by the mere apprehension of the punishment which is denounced.

By this circumstance, torture stands distinguished not only from compulsion itself, but from any lot of punishment considered as applied to the purpose of compulsion in the ordinary mode.

The notion of torture is not included in a punishment attached to an act of disobedience, of which no remission is allowed; but suppose the same lot of pain attached to the same offence, with power to remit any part of it, in case of, and immediately upon compliance with the requisition of the law, and

here the punishment comes under the notion and denomination of torture.

Between compensation, or satisfaction and punishment, the relation is of this sort: in all cases, if compensation be the end in view, so far as concerns pecuniary compensation, by whatsoever is done for the purpose of compensation, the effect of pecuniary punishment is produced likewise. More suffering, however, will in general be produced by what is taken for the purpose of compensation, than if the same amount were taken for the purpose of punishment: it will be accompanied by the regret produced by the idea of the advantage not only reaped by an adversary, but reaped at one's own expense.

On the other hand, by the contemplation of the suffering inflicted by punishment on the delinquents, good in the shape of compensation, or say vindictive satisfaction, is administered to the party injured.

Between taxation and punishment of the pecuniary kind, for it is only in this form that they can be compared, the relation is of this sort; they both consist in the application of compulsion to the extracting out of the pocket in question a certain sum; the difference between them consists in the end in view. In the case of taxation, the object is the obtainment of a certain sum; in the case of punishment, the object is the prevention of the obnoxious act, to the commission of which the obligation of paying the money is attached in the character of a punishment. In the case of taxation, the wish of the legislator is, that the money may be paid; and, consequently, if it be to the performance of a certain act that the obligation of paying the money is annexed, his wish is that the act may be performed.

As in the two cases the result intended is opposite, the actual results are accordingly incompatible, in so far as either result is obtained, the other is missed. Whether the effect of any given law shall be taxation, or effectual prohibition, depends, in the instance of each individual, upon the value, which, in the case in question, he is called upon to pay, compared with the value in his estimation of the advantage which stands annexed to the exercise of the act; if the advantage appear the greater, he pays the money and exercises the act; if the value of the money to be eventually paid appear the greater, he obeys the prohibitory law, and abstains from the performance of the act.

When the face assumed by any law is that of a prohibition, if the penalty be nothing but pecuniary and the amount is fixed, while the profits of the offence are variable, the probability is, that in many instances the penalty, even if levied, which could not be without detection, prosecution, and conviction, would but operate as a taxed licence.

This circumstance is so obvious, that one would have thought it could not have been overlooked; had it, however, been observed with any tolerable steadiness in England, the law of that country would wear a face widely different from that which it wears at present.

In relation to all these several results or concomitants* of punishment, one observation useful to be borne in mind, that it may

* The distinctions between these several objects may be illustrated by an example.

In 1769, a jury gave a verdict of £4,000 damages against the Earl of Halifax, for the wrongful imprisonment of John Wilkes, Esq. on suspicion of being the author of a state libel. It may be inquired, what sort of act did the jury perform, when by giving this verdict they appointed the sum in question to be paid by the one person to the other?

It was intended to be an act of punishment. If any juryman being angry with Lord Halifax also intended to produce pain in him, on account of the pleasure he took in thinking of that pain; in the case of such juryman it was an act of vengeance; being done, however, on account of an act that had been done, viz. the imprisonment of Mr. Wilkes, it was not an act of antipathy.

If any juryman did it with a view of deterring Lord Halifax, or any one who might occupy that nobleman's place in future, from doing acts of the like kind, and of preventing the mischief apprehended from such acts, it was in him an act for amendment and determent. It could not, however, operate for the purpose of disablement, the paying of a sum of money, having no tendency to disable Lord Halifax, or those holding the same office, from imprisoning others who might become the objects of their dislike.

It was not an act of immediate self-defence, for self-defence implies attack, that is, implies that there is some person who is actually using his endeavours to do mischief to the party defending himself. If, however, any juryman, thinking himself in danger of suffering in the like, or any other manner from Lord H., and persons liable to act as he did, joined in the verdict with the view of preserving himself from such suffering, to wit, by means of the restraint which the fear of similar punishment might be expected to impose on Lord Halifax and such other persons, on the part of such juryman it was an act of self-preservation.

The payment of the fine imposed could contribute nothing to the purposes of safe custody or physical restraint, neither was it an act of compulsion, for it was not designed as a means of compelling him to do anything.

It was not an act of torture; the penalty, if paid, was paid instantaneously; the act of paying ceasing of itself, and not being capable of being protracted so as to be made to cease only at a future given instance.

If any juryman did it with the view of making Mr. Wilkes amends for the pain he had suffered by the supposed injury in question, in such juryman it was an act of compensation; and if the juryman who intended to make compensation to Mr. Wilkes also thought that it was right to tax Lord Halifax to the amount of the compensation proper to be given to Mr. Wilkes, it was an act of taxation.

operate as a preservative against much error, is — that it is but in very few, if any of these instances, that from the name by which the object is here designated, any true judgment can be formed on any such question as whether and how far the object is a fit object of pursuit or aim in the character of an end.

Take any one of them for example, — if taken by itself that object be of the nature of good, yet, in the first place, that good may be in any degree minute; in the next place, to the quantity of evil with which it may happen to it to be followed, there are no limits: and thus it is that false must be that proposition, which, without leaving room for exceptions, should pronounce the attainment of that object to be universally an end fit to be aimed at, whether through the intervention of punishment, or any other means; and conversely.

Of the distinctions here pointed out between punishment and the several objects that are of kin to it, five distinguishable practical uses may be made.

1. They may serve as a memento to the legislator, to see on every occasion, that for the several objects which may have place, and present a demand for legislative provision, due and adequate provision is accordingly made.

2. To preserve him from the delusion which would have place, wheresoever it happens that by one and the same lot of evil, due and adequate provision may be made for two or more of these purposes, if by the difference of their respective denominations, he were led to give birth to two or more lots of evil for the purpose of effecting the good, for the effectuation of which one of them would suffice.

3. That in each instance, in comparing the end he has in view with the means which he proposes to employ for the attainment of it, the view he takes of such proposed means may be sufficiently clear, correct, and complete, to enable him to form a correct judgment of the mode and degree in which they promise to be conducive to the attainment of the end.

4. That he may be upon his guard against that sort of rhetorical artifice which operates by substituting for the proper name of the object or result in question, according to the purpose in view, the name of some other object or result, the name of which is either more or less popular than the proper one.

5. That while in pursuit of any one of these objects, in the character of an *end*, he employs such means as to his conception appear conducive to that end, he may be correctly and completely aware of any tendency which such arrangements may have to be conducive or obstructive, with reference to any other of these same ends.

CHAPTER II.

CLASSIFICATION.

In a former work it has been shown,* that offences against individuals may be ranged under four principal heads; offences against the *person*, *property*, *reputation*, and *condition*. The same division may be applied to punishments; an individual can only be punished by affecting his person, his property, his reputation, or his condition.

The circumstance which renders these two classifications similar is this — punishments and offences are both evils caused by the free agency of man. In as many points as we are liable to be injured by the hand of an offender, in so many points is the offender himself exposed to the sword of justice. The difference between punishments and offences is not, then, in their nature, which is, or may be, the same; but in the legality of the one, and the illegality of the other, offences are prohibited, punishments are instituted by the laws. Their effects also are diametrically opposite. An offence produces an evil both of the *first* and *second order*;† it causes suffering in an individual which he was unable to avoid, and it spreads an alarm more or less general. A punishment produces an *evil* of the *first order*, and a *good* of the *second order*. It inflicts suffering upon an individual who has incurred it voluntarily, and in its secondary effects it produces only good: it intimidates the ill-disposed, it reassures the innocent, and becomes the safeguard of society.

Those punishments which immediately affect the person in its active or passive powers, constitute the class of corporal punishments: they may be divided into the following different kinds: —

1. Simply afflictive punishments.
2. Complexly afflictive punishments.
3. Restrictive punishments.
4. Active or laborious punishments.
5. Capital punishments.

Punishments which affect property, repu-

* *Introduction to Principles of Morals and Legislation.*

† See *Principles of Morals and Legislation*, ch. 12, page 69, 'Of the consequences of a Mischievous Act.' — "The mischief of an offence may frequently be distinguished, as it were, into two shares or parcels; the one containing what may be called the primary; the other what may be called the secondary. That share may be termed *primary* which is sustained by an assignable individual, or a multitude of assignable individuals. That share may be termed secondary, which, taking its origin from the former, extends itself rather over the whole community, or over some other multitude of unassignable individuals."

For the full developement of this subject, reference may be made to the chapter indicated.

tation, or condition, possess this quality in common, they deprive the individual of some advantage which he before enjoyed; such are *privative* punishments, *losses*, and *forfeitures*. The punishments of this class are very various; they extend to every possible kind of possession.

Hence we perceive that all punishments may be reduced to two classes.

1. Corporal punishments.
2. Privative punishments, or punishments by loss or forfeiture.

CHAPTER III.

OF THE ENDS OF PUNISHMENT.

WHEN any act has been committed which is followed, or threatens to be followed, by such effects as a provident legislator would be anxious to prevent, two wishes naturally and immediately suggest themselves to his mind: first, to obviate the danger of the like mischief in future: secondly, to compensate the mischief that has already been done.

The mischief likely to ensue from acts of the like kind may arise from either of two sources, — either the conduct of the party himself who has been the author of the mischief already done, or the conduct of such other persons as may have adequate motives and sufficient opportunities to do the like.

Hence the prevention of offences divides itself into two branches: *Particular prevention*, which applies to the delinquent himself; and *general prevention*, which is applicable to all the members of the community without exception.

Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the apparent magnitude, or rather value* of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed, will also by that means be prevented.

With respect to a given individual, the recurrence of an offence may be provided against in three ways: —

1. By taking from him the physical power of offending.
2. By taking away the desire of offending.
3. By making him afraid of offending.

In the first case, the individual can no more commit the offence; in the second, he no longer desires to commit it; in the third, he may still wish to commit it, but he no longer dares to do it. In the first case, there is a physical incapacity; in the second, a moral reformation; in the third, there is intimidation or terror of the law.

General prevention is effected by the denunciation of punishment, and by its application, which, according to the common expression, *serves for an example*. The punishment suffered by the offender presents to every one an example of what he himself will have to suffer, if he is guilty of the same offence.

General prevention ought to be the chief end of punishment, as it is its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all. That punishment which, considered in itself, appeared base and repugnant to all generous sentiments, is elevated to the first rank of benefits, when it is regarded not as an act of wrath or of vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.

With respect to any particular delinquent, we have seen that punishment has three objects: incapacitation, reformation, and intimidation. If the crime he has committed is of a kind calculated to inspire great alarm, as manifesting a very mischievous disposition, it becomes necessary to take from him the power of committing it again. But if the crime, being less dangerous, only justifies a transient punishment, and it is possible for the delinquent to return to society, it is proper that the punishment should possess qualities calculated to reform or to intimidate him.

After having provided for the prevention of future crimes, reparation still remains to be made, as far as possible, for those which are passed, by bestowing a compensation on the party injured; that is to say, bestowing a good equal to the evil suffered.

This compensation, founded upon reasons which have been elsewhere developed,† does not at first view appear to belong to the sub-

* I say *value*, in order to include the circumstances of *intensity*, *proximity*, *certainty*, and *duration*; which magnitude, properly speaking, does not. This may serve to obviate the objections made by Locke (book II. ch. 21) against the proposition, that man is determined by the greater apparent good.

† Traités, &c. tom. ii. p. 310.

ject of punishments, because it concerns another individual than the delinquent. But these two ends have a real connexion. There are punishments which have the double effect of affording compensation to the party injured, and of inflicting a proportionate suffering on the delinquent; so that these two ends may be effected by a single operation. This is, in certain cases, the peculiar advantage of pecuniary punishments.

CHAPTER IV.

CASES UNMEET FOR PUNISHMENT.

All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.

It is plain, therefore, that in the following cases punishment ought not to be inflicted:—1. Where it is *groundless:* 2. Where it must be *inefficacious;* because it cannot act so as to prevent the mischief: 3. Where it is *unprofitable* or too *expensive:* 4. Where it is *needless;* because the mischief may be prevented or cease of itself without it.

I. *Cases in which Punishment is groundless.*

1. Where there has never been any mischief, as in the case of consent: such consent, provided it be free and fairly given, being the best proof that can be obtained, that at least no immediate mischief upon the whole has been done to the party who gives it.

2. Where the mischief is *outweighed* by the production of a benefit of greater value, as in precautions against instant calamity, and the exercise of domestic, judicial, military, and supreme powers.

II. *Cases in which Punishment must be inefficacious.*

These are, 1. Where the penal provision is *not established* until after the act is done. Such are the cases of an *ex post facto* law, and of a sentence beyond the law. 2. Where the penal provision, though established, is *not conveyed* to the notice of the person on whom it is intended to operate, as from want of due promulgation. 3. Where the penal provision, though it were conveyed to the individual's notice, *could produce no effect* with respect to preventing his engaging in the act prohibited; as in the cases of extreme *infancy*, *insanity*, and *intoxication*. 4. Where the penal provision, though present to the party's notice, does not produce its effect, because he knows not the act he is about to engage in is of the number of those to which the penal provision relates. 5. Where, though the penal clause might exert a full and prevailing influence were it to act alone, yet by the *predominant* influence of some opposite cause upon the will, such as physical danger or threatened mischief, it must necessarily be ineffectual. 6. Where, though the penal clause may exert a full and prevailing influence over the *will* of the party, yet his *physical faculties* (owing to the predominant influence of some physical cause) are not in a condition to follow the determination of his will: insomuch that the act is absolutely involuntary, as through *compulsion* or *restraint*.

III. *Cases where Punishment is unprofitable.*

If the evil of the punishment exceed the evil of the offence, the punishment will be unprofitable: the legislator will have produced more suffering than he has prevented; he will have purchased exemption from one evil at the expense of a greater.

The evil resulting from punishment divides itself into four branches:—1. The evil of *coercion* or *restraint*, or the pain which it gives a man not to be able to do the act, whatever it be, which, by the apprehension of the punishment, he is deterred from doing. 2. The evil of *apprehension*, or the pain which a man, who has exposed himself to punishment, feels at the thoughts of undergoing it. 3. The evils of *sufferance*, or the pain which a man feels, in virtue of the punishment itself, from the time when he begins to undergo it. 4. The pain of sympathy, and the other *derivative* evils resulting to the persons who are in *connexion* with those who suffer from the preceding causes.

IV. *Cases where Punishment is needless.*

A punishment is needless, where the purpose of putting an end to the practice may be attained as effectually at a cheaper rate, by instruction, for instance, as well as by terror; by informing the understanding, as well as by exercising an immediate influence on the will. This seems to be the case with respect to all those offences which consist in the disseminating pernicious principles in matters of *duty*, of whatever kind the duty may be, whether political, moral, or religious: and this, whether such principles be disseminated *under*, or even *without* a sincere persuasion of their being beneficial. I say even *without;* for though, in such a case, it is not instruction that can prevent the individual from endeavouring to inculcate his principles, yet it may prevent others from adopting them: without which, the endeavours to inculcate them will do no harm. In such a case, the sovereign will commonly have little occasion to take an active part: if it be the interest of *one* individual to inculcate opinions that are pernicious, it will surely be the interest of other individuals to expose them. But if the sovereign must needs take a part in the controversy, the pen is the proper weapon wherewith to combat error, and not the sword.

On the other hand, as to the evil of the

offence, this will, of course, be greater or less according to the nature of each offence. The proportion between the one evil and the other will therefore be different in the case of each particular offence. The cases, therefore, where punishment is unprofitable on this ground, can by no other means be discovered, than by an examination of each particular offence.

These considerations ought at all times to be present to the mind of the legislator, whenever he establishes any punishment. It is from them that he will derive his principal reasons for general amnesties, on account of the multitude of delinquents; for the preservation of a delinquent, whose talents could not be replaced, or whose punishment would excite the public displeasure, or the displeasure of foreign powers.

CHAPTER V.

EXPENSE OF PUNISHMENT.

Expense of Punishment.—This expression, which has not yet been introduced into common use, may at first sight be accused of singularity and pedantry. It has, however, been chosen upon reflection, as the only one which conveys the desired idea, without conveying at the same time an anticipated judgment of approbation or disapprobation. The pain produced by punishments, is as it were a capital hazarded in expectation of profit. This profit is the prevention of crimes. In this operation, every thing ought to be taken into the calculation of profit and loss; and when we estimate the profit, we must subtract the loss, from which it evidently results, that the diminution of the expense, or the increase of the profit, equally tend to the production of a favourable balance.

The term *expense*, once admitted, naturally introduces that of *economy* or *frugality*. The mildness or the rigour of punishments is commonly spoken of: these terms include a prejudice in the one case of favour, in the other of disfavour, which prevents impartiality in their examination. But to say that a punishment is economic, is to use the language of reason and calculation.

We should say, then, that a punishment is *economic*, when the desired effect is produced by the employment of the least possible suffering. We should say that it is too *expensive*, when it produces more evil than good; or when it is possible to obtain the same good by means of a less punishment.

In this place, distinction should be made between the *real* and the *apparent* value of a punishment.

By the real value, I mean that which it would be found to have by one who, like the legislator, is in a condition accurately to trace and coolly to estimate it through all its parts, exempt from the delusions which are seen to govern the uninformed and unthinking part of mankind; knowing, beforehand, upon general principles, what the delinquent will know afterwards by particular experience.

By the apparent value of a punishment, I mean that which it appears to a delinquent to have at any time previous to that in which he comes to experience it; or to a person under temptation to become a delinquent previous to the time at which, were he to become so, he would experience it.

The real value of the punishment constitutes the expense. The apparent value influences the conduct of individuals. It is the real punishment that is the expense—the apparent punishment that gives the profit.

The profit of punishments has reference to the interests of two parties — the public, and the party injured. The expense of the punishment adds to this number a third interest, that of the delinquent.

It ought not to be forgotten, although it has been too frequently forgotten, that the delinquent is a member of the community, as well as any other individual — as well as the party injured himself; and that there is just as much reason for consulting his interest as that of any other. His welfare is proportionably the welfare of the community — his suffering the suffering of the community. It may be right that the interest of the delinquent should in part be sacrificed to that of the rest of the community; but it never can be right that it should be totally disregarded. It may be prudent to hazard a great punishment for the chance of obtaining a great good: it would be absurd to hazard the same punishment where the chance is much weaker, and the advantage much less. Such are the principles which direct men in their private speculations: why should they not guide the legislator?

Ought any real punishments to be inflicted? most certainly. Why? for the sake of producing the *appearance* of it. Upon the principle of utility, except as to so much as is necessary for reformation and compensation, for this reason, and for no other whatever. Every particle of real punishment that is produced, more than what is necessary for the production of the requisite quantity of apparent punishment, is just so much misery run to waste. Hence the real punishment ought to be as small, and the apparent punishment as great as possible. If hanging a man *in effigy* would produce the same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man *in person*.*

* At the Cape of Good Hope, the Dutch made use of a stratagem which could only succeed

If delinquents were constantly punished for their offences, and nobody else knew of it, it is evident that, excepting the inconsiderable benefit which might result in the way of disablement, or reformation, there would be a great deal of mischief done, and not the least particle of good. The *real* punishment would be as great as ever, and the *apparent* would be nothing. The punishment would befal every offender as an unforeseen evil. It would never have been present to his mind to deter him from the commission of crime. It would serve as an example to no one.

Delinquents may happen to know nothing of the punishment provided for them in either of two cases:—1. When it is inflicted without having been previously made known; 2. When, though promulgated, it has not been made known to the individual. The latter of these cases may be the case where the punishment is appointed by *statute*, or, as it is called, *written* law. The former must happen in all new cases where the punishment is appointed in the way of *common* or *unwritten* law.

The punishment appointed by the law, may be presented to the mind in two ways:—1. By its legal denunciation and description; 2. By its public execution, when it is inflicted with suitable notoriety.

The notion entertained of a punishment ought to be exact, or, as the logicians would say, adequate; that is, it should present to the mind not only a part, but the whole of the sufferings it includes. The denunciation of a punishment ought therefore to include all the items of which it is composed, since that which is not known cannot operate as a motive.

Hence we may deduce three important maxims:—

1. That a punishment that is more easily learnt, is better than one that is less easily learnt.

2. That a punishment that is more easily remembered, is better than one that is less easily remembered.

3. That a punishment that appears of greater magnitude, in comparison of what it really is, is better than one that appears of less magnitude.

CHAPTER VI.

MEASURE OF PUNISHMENT.

" . . . . . Adsit
Regula, peccatis quæ pœnas irroget æquas.
Ne scutica dignum, horribili sectere flagello."
Hor. *L.* I. *Sat.* iii.

Establish a proportion between crimes and punishments, has been said by Montesquieu, Beccaria, and many others. The maxim is, without doubt, a good one; but whilst it is thus confined to general terms, it must be confessed it is more oracular than instructive. Nothing has been accomplished, till wherein this proportion consists has been explained, and the rules have been laid down by which it may be determined that a certain measure of punishment ought to be applied to a certain crime.

Punishments may be too small or too great; and there are reasons for not making them too small, as well as for not making them too great. The terms *minimum* and *maximum* may serve to mark the two extremes of this question, which require equal attention.

With a view of marking out the limits of punishment on the side of the first of these extremes, we may lay it down as a rule—

I. That the value of the punishment must not be less, in any case, than what is sufficient to outweigh that of the profit of the offence.

By the profit of the crime, must be understood not only pecuniary profit, but every advantage, real or apparent, which has operated as a motive to the commission of the crime.

The profit of the crime is the force which urges a man to delinquency: the pain of the punishment is the force employed to restrain him from it. If the first of these forces be the greater, the crime will be committed;* if the second, the crime will not be committed. If, then, a man, having reaped the profit of a crime, and undergone the punishment, finds the former more than equivalent to the latter, he will go on offending for ever; there is nothing to restrain him. If those, also, who behold him, reckon that the balance of gain is in favour of the delinquent, the punishment will be useless for the purposes of example.

The Anglo-Saxon laws, which fixed a price upon the lives of men—200 shillings for the murder of a peasant, six times as much for that of a nobleman, and thirty-six times as

among Hottentots. One of their officers having killed an individual of this inoffensive tribe, the whole nation took up the matter, and became furious and implacable. It was necessary to make an example to pacify them. The delinquent was therefore brought before them in irons, as a malefactor: he was tried with great form, and was condemned to swallow a goblet of ignited brandy. The man played his part;—he feigned himself dead, and fell motionless. His friends covered him with a cloak, and bore him away. The Hottentots declared themselves satisfied. "The worst we should have done with the man," said they, "would have been to throw him into the fire; but the Dutch have done better—they have put the fire into the man."—*Lloyd's Evening Post*, for August or September 1776.

* That is to say, committed by those who are only restrained by the laws, and not by any other tutelary motives, such as benevolence, religion, or honour.

much for that of the king — evidently transgressed against this rule. In a great number of cases, the punishment would appear nothing, compared with the profit of the crime.

The same error is committed whenever a punishment is established which reaches only to a certain fixed point, which the advantage of the crime may surpass.

Authors of celebrity have been found desirous of establishing a rule precisely the reverse: they have said, that the greatness of temptation is a reason for lessening the punishment; because it lessens the fault; because the more powerful the seduction, the less reason is there for concluding that the offender is depraved. Those, therefore, who are overcome, in this case, naturally inspire us with commiseration.*

This may all be very true, and yet afford no reason for departing from the rule. That it may prove effectual, the punishment must be more dreaded than the profit of the crime desired. Besides, an inefficacious punishment is doubly mischievous; — mischievous to the public, since it permits the crime to be committed, — mischievous to the delinquent, since the punishment inflicted upon him is just so much misery in waste. What should we say to the surgeon, who, that he might save his patient a small degree of pain, should only half cure him? What should we think of his humanity, if he should add to his disease the torment of a useless operation?

It is therefore desirable that punishment should correspond to every degree of temptation; at the same time, the power of mitigation might be reserved in those cases where the nature of the temptation itself indicates the absence of confirmed depravity, or the possession of benevolence — as might be the case should a father commit a theft that he might supply his starving family with bread.†

Rule II. — *The greater the mischief of the offence, the greater is the expense it may be worth while to be at, in the way of punishment.*

This rule is so obvious in itself, that to say any thing in proof of it would be needless; but how few are the instances in which it has been observed? It is not long since that women were condemned to be burnt alive for uttering bad money. The punishment of death is still lavished on a multitude of offences of the least mischievous description. The punishment of burning is still in use in many countries for offences which might safely be left to the restraint of the moral sanction. If it can be worth while to be at the expense of so terrible a punishment as that of burning alive, it ought to be reserved for murder or incendiarism.

It will be said, perhaps, that the intention of legislators has always been to follow this rule, but that their opinions, as well as those of the people, have fluctuated respecting the relative magnitude and nature of crimes. At one period, witchcraft was regarded as the most mischievous offence. Sorcerers, who sold their souls to the devil, were objects of abhorrence. A heretic, the enemy of the Almighty, drew down divine wrath upon a whole kingdom. To steal property consecrated to divine uses was an offence of a more malignant nature than ordinary theft, the crime being directed against the Divinity. A false estimate being made of these crimes, an undue measure of punishment was applied to them.

Rule III. — *When two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.*

Two offences may be said to be in competition, when it is in the power of an individual to commit both. When thieves break into a house, they may execute their purpose in different manners: by simply stealing, by theft accompanied with bodily injury, or murder, or incendiarism. If the punishment is the same for simple theft, as for theft and murder, you give the thieves a motive for committing murder, because this crime adds to the facility of committing the former, and the chance of impunity when it is committed.

The great inconvenience resulting from the infliction of great punishments for small offences, is, that the power of increasing them in proportion to the magnitude of the offence is thereby lost.‡

* One is astonished that a writer of such consummate genius as Adam Smith should have fallen into this mistake. Speaking of smuggling, he says: "The law, contrary to all the ordinary principles of justice, first creates the temptation, and then punishes those who yield to it; and it commonly enhances the punishment, too, in proportion to the very circumstance which ought certainly to alleviate it — the temptation to commit the crime." — *Wealth of Nations*, b. v. ch. 2.

† It is easy to estimate the profit of a crime in cases of rapacity, but how are we to ascertain it in those of malice and enmity?

The profit may be estimated by the nature of the mischief that the offender has done to his adversary. Has his conduct been more offensive than painful? The profit is the degree of humiliation that he believes his adversary to have undergone. Has he mutilated or wounded him? The profit is the degree of suffering he has inflicted.

In this, in his own opinion, consists the profit of his offence: if, then, he is punished in an analogous manner, he is struck in the most sensible part, which has, so to speak, been pointed out by himself; for it is not possible but that the mischief which he has chosen as the instrument of his vengeance, must appear hurtful to himself.

‡ Montesquieu, after having recommended this rule of proportion, adds, "Quand il n'y a point de difference dans la peine, il faut en met-

Rule IV.—*The punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.*

Thus, for example, in adjusting the punishment for stealing a sum of money, let the magnitude of the punishment be determined by the amount of the sum stolen. If for stealing ten shillings an offender is punished no more than for stealing five, the stealing of the remaining five of those ten shillings is an offence for which there is no punishment at all.

The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible; therefore—

Rule V.—*The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*

Rule VI.—*That the quantity of punishment actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into the account.*

The same *nominal* punishment is not, for different individuals, the same *real* punishment. Let the punishment in question be a fine: the sum that would not be felt by a rich man, would be ruin to a poor one. The same ignominious punishment that would fix an indelible stigma upon a man of a certain rank, would not affect a man of a lower rank. The same imprisonment that would be ruin to a man of business, death to an old man, and destruction of reputation to a woman, would be as nothing, or next to nothing, to persons placed in other circumstances.

The law may, by anticipation, provide that such or such a degree of mitigation shall be made in the amount of the punishment, in consideration of such or such circumstances influencing the sensibility of the patient; such as age, sex, rank, &c. But in these cases, considerable latitude must be left to the judge.*

Of the above rules of proportion, the four first may serve to mark out the limits on the minimum side—the limits *below* which a punishment ought not to be diminished; the fifth will mark out the limits on the maximum side—the limits above which it ought not to be increased.

The minimum of punishment is more clearly marked than its maximum. What is *too little* is more clearly observed than what is *too much*. What is not sufficient is easily seen, but it is not possible so exactly to distinguish an excess: an approximation only can be attained. The irregularities in the force of temptations compel the legislator to increase his punishments, till they are not merely sufficient to restrain the ordinary desires of men, but also the violence of their desires when unusually excited.

The greatest danger lies in an error on the minimum side, because in this case the punishment is inefficacious; but this error is least likely to occur, a slight degree of attention sufficing for its escape; and when it does exist, it is at the same time clear and manifest, and easy to be remedied. An error on the maximum side, on the contrary, is that to which legislators and men in general are naturally inclined: antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side, therefore, that we should take the most precautions, as on this side there has been shown the greatest disposition to err.

By way of supplement and explanation to the first rule, and to make sure of giving to the punishment the superiority over the offence, the three following rules may be laid down:—

Rule VII.—*That the value of the punishment may outweigh the profit of the offence, it must be increased in point of magnitude, in proportion as it falls short in point of certainty.*

Rule VIII.—*Punishment must be further increased in point of magnitude, in proportion as it falls short in point of proximity.*

The profit of a crime is commonly more certain than its punishment; or, what amounts to the same thing, appears so to the offender. It is generally more immediate: the temptation to offend is present; the punishment is at a distance. Hence there are two circumstances which weaken the effect of punishment, its *uncertainty* and its *distance*.

Suppose the profit of a crime equal to £10 sterling; suppose the chance of punishment as one to two. It is clear, that if the punishment, supposing that it were to take place, is not more than £10 sterling, its effect upon a man's mind whilst it continues uncertain, is not equal to a certain loss of £10 sterling: it is only equal to a certain loss of £5 sterling. That it may be rendered equal to the profit of the crime, it must be raised to £20.

Unless men are hurried on by outrageous

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tre, dans l'esperance de la grâce; en Angleterre, on n'assassine point (il auroit du dire *peu*), parce que les voleurs peuvent esperer d'être transportés dans les colonies, non pas les assassines."—*Esprit des Lois*, lib. vi. ch. 16.

This expectation of favour, no doubt, contributes to the effect of which he speaks; but why should this manifest imperfection in the laws remain, that it may be corrected by an arbitrary act of the sovereign? If an uncertain advantage produces this measure of good, a certain advantage would operate more surely.

* See Introduction to Morals and Legislation—Circumstances influencing Sensibility.

passion, they do not engage in the career of crime without the hope of impunity. If a punishment were to consist only in taking from an offender the fruit of his crime, and this punishment were infallible, there would be no more such crimes committed; for what man would be so insensate as to take the trouble of committing a crime with the certainty of not enjoying its fruits, and the shame of having attempted it? But as there are always some chances of escape, it is necessary to increase the value of the punishment, to counterbalance these chances of impunity.

It is therefore true, that the more the certainty of punishment can be augmented, the more it may be diminished in amount. This is one advantage resulting from simplicity of legislation, and excellence of legal procedure.

For the same reason, it is necessary that the punishment should be as near, in point of time, to the crime, as possible; because its impression upon the minds of men is weakened by distance; and because this distance adds to the uncertainty of its infliction, by affording fresh chances of escape.

Rule IX.—*When the act is conclusively indicative of a habit, such an increase must be given to the punishment as may enable it to outweigh the profit, not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.*

Severe as this conjectural calculation may appear, it is absolutely necessary in some cases. Of this kind are fraudulent crimes; using false weights or measures, and issuing base coin. If the coiner was only punished according to the value of the single crime of which he is convicted, his fraudulent practice would, upon the whole, be a lucrative one. Punishment would therefore be inefficacious, if did not bear a proportion to the total gain which may be supposed to have been derived, not from one particular act, but from a train of actions of the same kind.

There may be a few other circumstances or considerations which may influence, in some small degree, the demand for punishment; but as the propriety of these is either not so demonstrable, or not so constant, or the application of them not so determinate, as that of the foregoing, it may be doubted whether they are worth putting on a level with the others.

Rule X.—*When a punishment, which in point of quality is particularly well calculated to answer its intention, cannot exist in less than a certain quantity, it may sometimes be of use, for the sake of employing it, to stretch a little beyond that quantity which, on other accounts, would be strictly necessary.*

Rule XI.—*In particular, this may be the case where the punishment proposed is of such a nature as to be particularly well calculated to answer the purpose of a moral lesson.*

Rule XII.—*In adjusting the quantum of punishment, the circumstances by which all punishment may be rendered unprofitable ought to be attended to.*

And lastly, as too great a nicety in establishing proportions between punishment and crime would tend to defeat its own object, by rendering the whole matter too complex, we may add—

Rule XIII.—*Among provisions designed to perfect the proportion between punishments and offences, if any occur which by their own particular good effects would not make up for the harm they would do by adding to the intricacy of the code, they should be omitted.*

The observation of rules of proportion between crimes and punishments has been objected to as useless, because they seem to suppose, that a spirit of calculation has place among the passions of men, who, it is said, never calculate. But dogmatic as this proposition is, it is altogether false. In matters of importance, every one calculates. Each individual calculates with more or less correctness, according to the degrees of his information, and the power of the motives which actuate him; but all calculate. It would be hard to say that a madman does not calculate. Happily, the passion of cupidity, which on account of its power, its constancy, and its extent, is most formidable to society, is the passion which is most given to calculation. This, therefore, will be more successfully combated, the more carefully the law turns the balance of profit against it.

CHAPTER VII.

OF THE PROPERTIES TO BE GIVEN TO A LOT OF PUNISHMENT.

IT has been shown what rules ought to be observed in adjusting the proportion between punishment and offences. The properties to be given to a lot of punishment in every instance will of course be such as it stands in need of, in order to be capable of being applied in conformity to those rules: the *quality* will be regulated by the *quantity*.

I. *Variability.*

The first quality desirable in a lot of punishment is *variability;* that it be susceptible of degrees both of intensity and duration.

An *invariable* punishment cannot be made to correspond to the different degrees of the scale of punishment; it will be liable to err either by excess or defect: in the first case, it would be too expensive; in the second, inefficacious.

Acute corporeal punishments are extremely

variable in respect of intensity, but not of duration. Penal labour is variable in both respects, in nearly equal degrees.

Chronic punishments, such as banishment and imprisonment, may be easily divided as to their duration: they may also be varied as to their intensity. A prison may be more or less severe: banishment may be directed to a genial or ungenial clime.

II. *Equability.*

A second property, intimately connected with the former, may be styled *equability*. It will avail but little, that a mode of punishment (proper in all other respects) has been established by the legislature, and that capable of being screwed up or let down to any degree that can be required, if, after all, whatever degree of it be pitched upon, that same degree shall be liable, according to circumstances, to produce a very heavy degree of pain, or a very slight one, or even none at all. An equable punishment is free from this irregularity: an unequable one is liable to it.

Banishment is unequable: it may either prove a punishment or not, according to the temper, the age, the rank, or the fortune of the individuals. This is also the case with *pecuniary* or *quasi pecuniary* punishment, when it respects some particular species of property which the offender may or may not possess. By the English law, there are several offences which are punished by a total forfeiture of moveables, not extending to immoveables. In some cases, this is the principal punishment: in others, even the only one. The consequence is, that if a man's fortune happen to consist in moveables, he is ruined; if in immoveables, he suffers nothing.

In the absence of other punishment, it may be proper to admit an unequable punishment. The chance of punishing some delinquents is preferable to universal impunity.

One mode of obviating the evil of inequality consists in the providing of two different species of punishment, not to be used together, but that the one may be substituted for, and supply the defects of the other: for example, corporeal may be substituted for pecuniary punishment, when the poverty of the individual prevents the application of the latter.

An uncertain punishment is unequable. Complete certainty supposes complete equability; that is to say, that the same punishment shall produce in every case the same degree of suffering. Such accuracy is, however, evidently unattainable, the circumstances and sensibility of individuals being so variable and so unequal. All that can be accomplished is to avoid striking and manifest inequality. In the preparation of a penal code, it ought constantly to be kept in view, that according to circumstances, of condition, fortune, age, sex, &c. the same nominal is not the same real punishment. A fixed fine is always an unequable punishment; and the same remark is applicable to corporeal punishments. Whipping is not the same punishment when applied to all ages and ranks of persons. In China, indeed, every one is submitted to the bamboo, from the water-carrier to the mandarin; but this only proves, that among the Chinese the sentiments of honour are unknown.

III. *Commensurability.*

Punishments are commensurable, when the penal effects of each can be measured, and a distinct conception formed, of how much the suffering produced by the one falls short of or exceeds that produced by another. Suppose a man placed in a situation to choose between several crimes:—he can obtain a sum of money by theft, by murder, or by arson: the law ought to give him a motive to abstain from the greatest crime; he will have that motive, if he see that the greatest crime draws after it the greatest punishment: he ought, therefore, to be able to compare these punishments among themselves, and measure their different degrees.

If the same punishment of death is denounced for these three crimes, there is nothing to compare; the individual is left free to choose that crime which appears most easy of execution, and least liable to be detected.

Punishments may be made commensurable in two ways: 1. By adding to a certain punishment another quantity of the same kind; for example, to five years of imprisonment for a certain crime, two more years for a certain aggravation: 2. By adding a punishment of a different kind; for example, to five years of imprisonment for a certain crime, a mark of disgrace for a certain aggravation.

IV. *Characteristicalness.*

Punishment can act as a preventative only when the idea of it, and of its connexion with the crime, is present to the mind. Now, to be present, it must be remembered; and to be remembered, it must have been learnt. But of all punishments that can be imagined, there are none of which the connexion with the offence is either so easily learnt, or so efficaciously remembered, as those of which the idea is already in part associated with some part of the offence, which is the case when the one and the other have some circumstance that belongs to them in common.

The law of retaliation is admirable in this respect. *An eye for an eye, and a tooth for a tooth.* The most imperfect intelligence can connect these ideas. This rule of retaliation is, however, rarely practicable: it is too un-

equable and too expensive; recourse must therefore be had to other sources of analogy. We shall therefore recur to this subject in the next chapter.

V. *Exemplarity.*

A mode of punishment is exemplary in proportion to its *apparent*, not to its *real* magnitude. It is the apparent punishment that does all the service in the way of example. A real punishment, which should produce no visible effects, might serve to intimidate or reform the offender subjected to it; but its use, as an example to the public, would be lost.

The object of the legislator ought therefore to be, so far as it may be safely practicable, to select such modes of punishment as, at the expense of the least *real*, shall produce the greatest *apparent* suffering; and to accompany each particular mode of punishment with such *solemnities* as may be best calculated to further this object.

In this point of view, the *auto-da-fés* would furnish most useful models for acts of justice. What is a public execution? It is a solemn tragedy, which the legislator presents before an assembled people — a tragedy truly important, truly pathetic, by the sad reality of its catastrophe, and the grandeur of its object. The preparation for it, the place of exhibition, and the attendant circumstances, cannot be too carefully selected, as upon these the principal effect depends. The tribunal, the scaffold, the dresses of the officers of justice, the religious service, the procession, every kind of accompaniment, ought to bear a grave and melancholy character. The executioners might be veiled in black, that the terror of the scene might be heightened, and these useful servants of the state screened from the hatred of the people.

Care must however be taken lest punishment become unpopular and odious through a false appearance of rigour.

VI. *Frugality.*

If any mode of punishment is more apt than another to produce superfluous and needless pain, it may be styled *unfrugal;* if less, it may be styled *frugal.* The perfection of frugality in a mode of punishment, is where not only no superfluous pain is produced on the part of the person punished, but even that same operation, by which he is subjected to pain, is made to answer the purpose of producing pleasure on the part of some other person.

Pecuniary punishments possess this quality in an eminent degree: nearly all the evil felt by the party paying, turns to the advantage of him who receives.

There are some punishments which, with reference to the public expense, are particularly unfrugal: for example, mutilations, applied to offences of frequent occurrence, such as smuggling. When an individual is rendered unable to work, he must be supported by the state, or rendered dependent upon public charity, and thus fixed as a burthen upon the most benevolent.

If the statement of Filangieri is correct, there were constantly in the state-prisons of Naples more than forty thousand idle prisoners. What an immense loss of productive power! The largest manufacturing town in England scarcely employs a greater number of workmen.

By the military laws of most countries, deserters are still condemned to death. It costs little to shoot a man; but every thing which he might be made to produce, is lost; and to supply his place, a productive labourer must be converted into an unproductive one.

VII. *Subserviency to Reformation.*

All punishment has a certain tendency to deter from the commission of offences; but if the delinquent, after he has been punished, is only deterred by fear from the repetition of his offence, he is not reformed. Reformation implies a change of character and moral dispositions.

Hence those punishments which are calculated to weaken the seductive, and to strengthen the preserving motives, have an advantage over all others with respect to those offences to which they can be applied.

There are other punishments which have an opposite tendency, and which serve to render those who undergo them still more vicious. Punishments which are considered infamous, are extremely dangerous in this respect, particularly when applied to slight offences and juvenile offenders. *Diligentius enim vivit, cui aliquid integri superest. Nemo dignitati perditæ parcit. Impunitatis genus est jam non habere pœnæ locum.**

Of this nature also, in a high degree, is the punishment of imprisonment, when care is not taken to prevent the indiscriminate association of prisoners, but the juvenile and the hoary delinquents are allowed to meet and to live together. Such prisons, instead of places for reform, are schools of crime.

VIII. *Efficacy with respect to Disablement.*

A punishment which takes away the power of repeating the crime must be very desirable, if not too costly. Imprisonment, whilst it continues, has this effect in a great measure. Mutilation sometimes reduces the power of committing crimes almost to nothing, and death destroys it altogether. It will, however, be perceived, that whilst a man is disabled from doing mischief, he is also in great

* Senec. de Clem. chap. xxii.

measure disabled from doing good to himself or others.

In some extraordinary cases, the power of doing mischief can only be destroyed by death: as, for example, the case of civil war, when the mere existence of the head of a party is sufficient to keep alive the hopes and exertions of his partisans. In such a case, however, the guilt of the parties is often problematic, and the punishment of death savours more of vengeance than of law.

There are, however, cases in which the ability to do mischief may be taken away with great economy of suffering. Has the offence consisted in an abuse of power — in an unfaithful discharge of duty? it is sufficient to depose the delinquent, to remove him from the employment, the administration, the guardianship, the trust he has abused. This remedy may equally be employed in domestic and political government.

IX. *Subserviency to Compensation.*

A further property desirable in a lot of punishment is, that it may be convertible to profit.

When a crime is committed, and afterwards punished, there have existed two lots of evil — the evil of the offence, and the evil of the punishment. Whenever, then, the evil of the offence falls upon a specific person, if the punishment yield a profit, let the profit arising from it be given to that person. The evil of the offence will be removed, and there will then only exist one lot of evil, instead of two. When there is no specific party injured, as when the mischief of the crime consists in alarm or danger, there will be no specific injury to be compensated; still, if the punishment yield a profit, there is a clear balance of good gained.

This property is possessed in a more eminent degree by pecuniary than by any other mode of punishment.

X. *Popularity.*

In the rear of all these properties may be introduced that of *popularity* — a very fleeting and indeterminate kind of property, which may belong to a lot of punishment one moment, and be lost by it the next. This property, in strictness of speech, ought rather to be called *absence of unpopularity;* for it cannot be expected, in regard to such a matter as punishment, that any species or lot of it should be positively acceptable and grateful to the people: it is sufficient, for the most part, if they have no decided aversion to the thoughts of it.

The use of inserting this property in the catalogue is, that it may serve as a memento to the legislator not to introduce, without a cogent necessity, any mode or lot of punishment towards which any violent aversion is entertained by the body of the people, since it would be productive of useless suffering, — suffering borne not by the guilty, but the innocent; and among the innocent, by the most amiable, by those whose sensibility would be shocked, whose opinions would be outraged, by the punishment which would appear to them violent and tyrannical. The effect of such injudicious conduct on the part of a legislator would be to turn the tide of popular opinion against himself: he would lose the assistance which individuals voluntarily lend to the execution of the laws which they approve: the people would not be his allies, but his enemies. Some would favour the escape of the delinquent; the injured would hesitate to prosecute, and witnesses to bear testimony against him. By degrees, a stigma would attach to those who assisted in the execution of the laws. Public dissatisfaction would not always stop here: it would sometimes break out into open resistance to the officers of justice and the execution of such laws. Successful resistance would be considered a victory, and the unpunished delinquent would rejoice over the weakness of the laws disgraced by his triumph.

The unpopularity of particular punishments almost always depends upon their improper selection. The more completely the penal code shall become conformed to the rules here laid down, the more completely will it merit the enlightened approbation of the wise, and the sentimental approval of the multitude.

XI. *Simplicity of Description.*

A mode of punishment ought also to be as simple as possible in its description: it ought to be entirely intelligible; and that not only to the enlightened, but to the most unenlightened and ignorant.

It will not always be proper, however, to confine punishments to those of a simple description: there are many offences in which it will be proper that the punishment should be composed of many parts; as of pecuniary fine, corporal suffering, and imprisonment, The rule of *simplicity* must give way to superior considerations: it has been placed here, that it may not be lost sight of. The more complex punishment is, the greater reason is there to fear that it will not be present as a whole to the mind of an individual in the time of temptation: of its different parts he may never have known some — he may have forgotten others. All the parts will be found in the *real* punishment, but they have not been perceived in the *apparent.*

The name of a punishment is an important object. Enigmatical names spread a cloud over the mass of punishments, which the mind cannot dissipate. The English laws

are frequently defective in this respect. A *capital felony* includes different lots of punishment, the greater part unknown, and consequently inefficacious. A *felony with benefit of clergy* is equally obscure: the threatening of the law does not convey any distinct idea to the mind; — the first idea which the term would offer to an uninstructed person would be, that it had some reference to a reward. A *præmunire* is not more intelligible; even those who understand the Latin word are far from comprehending the nature of the punishment which it denounces.

Riddles of this kind resemble those of the sphynx: those are punished who do not decypher them.

XII. *Remissibility*

Remissibility is the last of all the properties that seem to be requisite in a lot of punishment. The general presumption is, that when punishment is applied, punishment is needful; that it ought to be applied, and therefore cannot be remitted. But in very particular, and those very deplorable cases, it may by accident happen otherwise. Punishment may have been inflicted upon an individual whose innocence is afterwards discovered. The punishment which he has suffered cannot, it is true, be remitted, but he may be freed from as much of it as is yet to come. There is, however, little chance of there being any yet to come, unless it be so much as consists of *chronical* punishment; such as imprisonment, banishment, penal labour, and the like. So much as consists in *acute* punishment, where the penal process itself is over presently, however permanent the punishment may be in its effects, may be considered as irremissible. This is the case, for example, with whipping, branding, mutilation, and capital punishment. The most perfectly irremissible of any is capital punishment. In all other cases, means of compensation may be found for the sufferings of the unfortunate victim, but not in this.

The foregoing catalogue of properties desirable in a lot of punishment, is far from unnecessary. On every occasion, before a right judgment can be formed, it is necessary to form an abstract idea of all the properties the object ought to possess. Unless this is done, every expression of approbation or disapprobation can arise only from a confused feeling of sympathy or antipathy. We now possess clear and distinct reasons for determining our choice of punishments. It remains only to observe in what proportion a particular punishment possesses these different qualities.

If a conclusion is drawn from one of these qualities alone, it may be subject to error: attention ought to be paid, not to one quality alone, but to the whole together.

There is no one lot of punishment which unites all these desirable qualities; but, according to the nature of the offences, one set of qualities is more important than another.

For great crimes, it is desirable that punishments should be exemplary and analogous. For lesser crimes, the punishments should be inflicted with a greater attention to their frugality, and their tendency to moral reformation. As to crimes against property, those punishments which are convertible to profit are to be preferred, since they may be rendered subservient to compensation for the party injured.

Note by Dumont.

I subjoin to this chapter an example of the progressive march of thought, and of the utility of these enumerations to which every new observation may be referred, so that nothing may be lost.

I have sought out from the works of Montesquieu all the qualities which he appears to have regarded as necessary in a lot of punishment. I have found only four, and these are either expressed by indefinite terms, or periphrasis: —

1. He says, that *Punishments should be drawn from the nature of the crimes;* and he appears to mean, that they should be characteristic.

2. That they should be *moderate;* an expression which is indeterminate, and does not yield any point of comparison.

3. That they should be *proportional to the crime.* This proportion has reference, however, rather to the quantity of the punishment than to its quality. He has neither explained in what it consists, nor given any rule respecting it.

4. That they should be *modest.*

Beccaria has mentioned *four* qualities: —

1. He requires that punishments should be *analogous to the crimes;* but he does not enter into any detail upon this analogy.

2. That they should be *public;* and he means by that, *exemplary.*

3. That they be *gentle;* an improper and unsignificant term; whilst his observations upon the danger of excess in punishment are very judicious.

4. That they should be *proportional;* but he gives no rule for this proportion.

He requires, besides this, that they should be *certain*, *prompt*, and *inevitable;* but these circumstances depend upon the forms of procedure in the application of punishment, and not upon its qualities.

In his commentary upon Beccaria, Voltaire often recurs to the idea of rendering punishments profitable: — "A dead man is good for nothing."

One of the heroes of humanity, the good and amiable Howard, had continually in view the amendment of delinquents.

Confining our attention to those who are considered as oracles in this branch of science, we cannot but observe, that between these scattered ideas, and vague conceptions, which have not yet received a name, and a regular catalogue in which these qualities are distinctly presented to us, with names and definitions, there is a wide interval. By thus placing them under one point of view, another advantage is gained: their true worth and comparative importance is determined.

CHAPTER VIII.

OF ANALOGY BETWEEN CRIMES AND PUNISHMENTS.

Analogy is that relation, connexion, or tie, between two objects, whereby the one being present to the mind, the idea of the other is naturally excited.

Likeness is one source of analogy, contrast another.* That a punishment may be analogous to an offence, it is necessary that the crime should be attended with some striking characteristic circumstances, capable of being transferred upon the punishment.

These characteristic circumstances will be different in different crimes. In some cases they may arise from the instrument whereby the mischief has been done; in others, from the object to which the mischief is done; in others, from the means employed to prevent detection.

The examples which follow are only intended clearly to explain this idea of analogy. I shall point out the analogy between certain crimes and certain punishments, without absolutely recommending the employment of those punishments in all cases. It is not a sufficient reason for the adoption of a punishment, that it is analogous: other considerations ought to be always regarded.

Montesquieu was dazzled by the merit of analogy in a punishment, and has attributed to it wonderful effects which it does not possess. — *Esprit des Lois*, xii. 4.

These considerations appear to afford a sufficient answer to the objection often raised against the methodic forms employed by Mr. Bentham. I refer to his divisions, tables, and classifications, which have been called his *logical apparatus*. All this, it has been said, is only the scaffold, which ought to be taken down when the building is erected. But why deprive his readers of the instruments which the author has employed? why hide from them his analytical labours and process of invention? These tables form a machine for thought — *organum cogitativum*. The author discloses his secret; he associates his readers with him in his labour; he gives them the clue which has guided him in his researches, and enables them to verify his results. The singularity is this — the extent of the service diminishes its value.

I am sensible, that by employing these logical methods as a secret — by not exhibiting, so to speak, the skeleton, the muscles, the nerves, much would be gained in elegance and interest. By using the method of analysis, everything is announced beforehand — there is nothing unexpected; — the whole is clear; and there are no points of surprise — no flashes of genius to dazzle for a moment, and then leave you in darkness. It requires courage to follow up so severe a method, but it is the only method which can completely satisfy the mind.

* Thus from the idea of a giant, the mind passes on to every thing that is great. The Liliputians called Gulliver the Man-mountain. Or, from the idea of a giant the mind may pass to that of a dwarf.

§ 1. *First Source of Analogy.*

The same Instrument used in the Crime as in the Punishment. — Incendiarism, inundation, poisoning: in these crimes, the instrument employed is the first circumstance which strikes the mind. In their punishment, the same instrument may be employed.

With respect to incendiarism, we may observe, that this crime should be considered as limited to those cases in which some individual has perished by fire: if no life has been lost, nor any personal injury been suffered, the offence ought to be treated as an ordinary waste; whether an article of property has been destroyed by fire, or any other agent, does not make any difference. The amount of the damage ought to be the measure of the crime. Does a man set fire to a solitary and uninhabited house? this would be an act of destruction, and ought not to be ranked under the definition of incendiarism.†

If the punishment of fire had been reserved for incendiaries, the law would have had in its favour both reason and analogy; but in the legislation of barbarous times, it has been generally employed throughout Europe, for the crimes of magic and heresy: the first, an offence purely imaginary; the second, a simple difference of religious opinion, perfectly innocent, often useful, and with respect to which, the only effect of punishment is to produce insincerity.

Fire may be employed as an instrument of punishment, without occasioning death. This punishment is variable in its nature through all the degrees of severity of which there can be any need. It would be necessary carefully to determine in the text of the law, the part of the body which ought to be exposed to the action of the fire; the intensity of the fire; the time during which it is to be applied, and the paraphernalia to be employed to increase the terror of the punishment. In order to render the description more striking, a print might be annexed, in which the operation should be represented.

Inundation is an offence less common than incendiarism: in some countries it is altogether unexampled; it can only be perpetrated in countries that are intersected by water confined by artificial banks. It is susceptible of every degree of aggravation, from the highest to the lowest. If the offence consist merely in inundation, in effect it amounts only to a simple destruction of property. It is by the destruction of life that this crime is raised to that degree of atrocity which requires severe punishment.

A most evident analogy points out the means of punishment; that is, the drowning

† The employment of this means of destruction ought, however, to be considered as aggravation, if there has been any danger of the fire communicating to contiguous objects.

of the criminal, with such accompanying circumstances as will add to the terror of the punishment. In a penal code which should not admit the punishment of death, the offender might be drowned and then restored to life. This might be made a part of the punishment.

It may be asked, ought poison to be employed as a means of punishment for a poisoner?

In some respects there is no punishment more suitable. Poisoning is distinguished from other murders, by the secrecy with which it may be perpetrated, and the cool determination which it supposes. Of these two circumstances, the first increases the force of temptation and the evil of the crime; the second proves that the criminal, attentive to his own interest, is capable of serious reflection upon the nature of the punishment. The idea of perishing by the same kind of death which he prepares, is the more frightful for him: in every step of his preparations, his imagination will represent to him his own lot. In this point of view, the analogy would produce its full effect.

There are, however, many difficulties. Poisons are uncertain in their operation: it would be necessary, therefore, to fix a time after which the punishment should be abridged by strangulation. If the effect of the poison should be to produce sleep, the punishment may not be sufficiently exemplary: if it produce convulsions and distortions, it may prove hateful.

If the poison administered by the criminal has not proved fatal, he may be made to take an antidote before the penal poison has produced death. The dose and the time may be fixed by the Judges, according to the report of skilful physicians.

The horror attached to this crime would most probably render this punishment popular. And if there is one country in which this crime is more common than others, it is there that this punishment, which possesses so striking an analogy with the crime, would be most suitable.

§ 2. *Second Source of Analogy.*

For a Corporal Injury, a similar Corporal Injury. — "An eye for an eye, a tooth for a tooth." In crimes producing irreparable bodily injuries, the part of the body injured will afford the characteristic circumstance. The analogy will consist in making the offender suffer an evil similar to that which he has maliciously and wilfully inflicted.

It will, however, be necessary to provide for two cases: that in which the offender does not possess the member of which he has deprived the party he has attacked, and that in which the loss of the member would be more or less prejudicial to him than to the party injured.

If the injury has been of an ignominious nature, without permanent mischief, similar ignominy may be employed in the punishment, when the rank of the party and other circumstances permit.

§ 3. *Third Source of Analogy*

Punishment of the Offending Member. — In crimes of deceit, the tongue and the hand are the usual instruments. An exact analogy in the punishment may be drawn from this circumstance.

In punishing the crime of forgery, the hand of the offender may be transfixed by an iron instrument fashioned like a pen; and in this condition he may be exhibited to the public, previously to undergoing the punishment of imprisonment.

In the utterance of calumny, and the dissemination of false reports, the tongue is the instrument employed. The offender might in the same manner be publicly exposed with his tongue pierced.

These punishments may be made more formidable in appearance than in reality, by dividing the instruments in two parts, so that the part which should pierce the offending member need not be thicker than a pin, whilst the other part of the instrument may be much thicker, and appear to penetrate with all its thickness.

Punishments of this kind may appear ridiculous; but the ridicule which attaches to them enhances their merit. This ridicule will be directed against the cheat, whom it will render more despicable, whilst it will increase the respect due to upright dealing.

§ 4. *Fourth Source of Analogy.*

Imposition of Disguise Assumed. — Some offences are characterized by the assumption of a disguise to facilitate their commission: a mask, or crape over the face, has commonly been used. This circumstance constitutes an aggravation of the offence: it increases the alarm produced, and diminishes the probability of detection; and hence arises the propriety of additional punishment. Analogy would recommend the imprinting on the offender a representation of the disguise assumed. This impression might be made either evanescent or indelible, according as the imprisonment by which it may be accompanied, is to be either temporary or otherwise. If evanescent, it might be produced by the use of a black wash: if indelible, by tatooing. The utility of this punishment would be most particularly felt in cases of premeditated murder, rape, irreparable personal injury, and theft, when accompanied with violence and alarm.

§ 5. *Other Sources of Analogy.*

There are other characteristic circumstances, which do not, like the foregoing, fall

into classes; which may, however, according to the nature of the different offences, be employed as a foundation for analogy.

In the fabrication of base coin, the art of the delinquent may furnish an analogous source of punishment. He has made an impression upon the metal he has employed; — a like impression may be made on some conspicuous part of his face. This mark may be either evanescent or indelible, according as the imprisonment by which it is to be accompanied is either temporary or perpetual.

At Amsterdam, vagabonds and idle persons are committed to the House of Correction, called the Rasp House. It is said, that among other species of forced labour in which such characters are employed, there is one reserved for those who are incorrigible by other means: which consists in keeping a leaky vessel, in which the idle prisoner is placed, dry, by means of a pump at which he must work, if he would keep himself from being drowned. Whether this punishment is in use or not, it is an example of an analogous punishment carried to the highest degree of rigour. If such a method of punishment is adopted, it ought to be accompanied with precise regulations for adjusting the punishment to the strength of the individual undergoing it.

The place in which a crime has been committed may furnish a species of analogy. Catherine II. condemned a man who had committed some knavish trick at the Exchange, to sweep it out every day that it was used, during six months.

Note by Dumont.

I am not aware of any objection having been urged against the utility of analogy in punishments: whilst it is spoken of only in general terms, everybody acknowledges its propriety; when we proceed to apply the principle, the imagination being the chief judge of the propriety of its application, the diversity of opinion is infinite. Hence some persons have been struck with extreme repugnance in contemplating the analogous punishments proposed by Mr. Bentham,* whilst others have considered them only as fit subjects for ridicule and caricature.

Success depends upon the choice of the means employed. Those sources of analogy ought therefore to be avoided which are not of a sufficiently grave character to be used as punishments; but it may be observed, that with relation to certain offences, those, for instance, which are accompanied by insolence and insult, that an analogous punishment which excites ridicule, is well calculated to humble the pride of the offender, and gratify the offended party.

Every thing ought also to be avoided which has an appearance of great study and refinement. Punishment ought only to be inflicted of necessity, and with feelings of regret and repugnance. The multitude of instruments possessed by a surgeon, may be contemplated with satisfaction, as intended to promote the cure and lessen the weight of our sufferings. The same satisfaction will not, however, be felt in contemplating a variety of punishments, and they will most likely be considered as degrading to the character of the legislator.

With these precautions, analogy is calculated to produce only good effects. It puts us in the track of discovering the most economical and efficacious punishments. I cannot resist the pleasure of citing an example furnished me by a captain in the English navy: he had not studied the principles of Mr. Bentham, but he knew how to read the human heart.

The leave of absence generally granted to sailors, was for twenty-four hours: if they exceeded this time, the ordinary punishment was the cat-o'-nine-tails. The dread of this punishment was a frequent cause of desertions. Many captains, in order to prevent both these offences, refused all leave of absence to their sailors, so that they were kept on shipboard for years together. The individual to whom I refer, discovered a method of reconciling the granting of leave with the security of the service. He made a simple change in the punishment: — Every man who exceeded his prescribed time of leave, lost his right to a future leave, in proportion to his fault. If he remained on shore more than twenty-four hours, he lost one turn; if more than forty-eight hours, he lost two turns; and so of the rest. The experiment was perfectly successful. The fault became less frequent, and desertions were unknown.

* Traites de Legislation.

CHAPTER IX.

OF RETALIATION.

If the law of retaliation were admissible in all cases, it would very much abridge the labours of the legislators. It would make short work of the business of laying out a plan of punishment — a word would supply the place of a volume.*

Before we say any thing as to the advantage of the rule, it will be proper to state with precision what is meant by it. The idea given of it in Blackstone's Commentaries seems to be a correct one; — it is that rule which prescribes, in the way of punishment, the doing to a delinquent the same hurt he has done (one might perhaps add, or attempted to do) to another. If the injury were done to the person, the delinquent should be punished in his person: if to property, in his property: if to the reputation, in his reputation. This is the general scheme; but this, however, in itself, is not quite enough. To make the punishment come incontestibly under the law of retaliation, the identity between the subject of the offence and that of the punishment should be still more specific and

* The law of retaliation was often adopted in the early attempts at legislation. Among the laws of Alfred we find the following article: — "Si quis alterius occulum effoderit, compenset proprio, dentem pro dente, manum pro manu, pedem pro pede, adustionem pro adustione, vulnus pro vulnere, vimen pro vimine." — *Wilk. Ll. Ang. Sax.* p. 30. Art. 19.

determinate. If, for example, the injury were to a man's house—for instance, by the destruction of his house, then the delinquent should have his house destroyed; if to his reputation, by causing him to lose a certain rank, then the delinquent should be made to lose the same rank; if to the eyes, then the criminal should be made to lose his eyes; if to his lip, then to lose his lip: and, in short, the more specific and particular the resemblance between the subject of the offence and of the punishment, the more strictly and incontestibly it would appear to come under the rule. It is when the person is the subject of the injury, that the resemblance is capable of being rendered the most minute; for it is in this case, that by means of the strict identity of the part affected, "*the hurt*" is capable of being rendered the most accurately the "*same.*" *An eye for an eye, and a tooth for a tooth*, are the familiar instances that are put of the law of retaliation. In this case, too, the identity may be pushed still further, by affecting the same part in the same manner; the sameness of the hurt depending on the identity of the one circumstance as well as of the other. Thus, if the injury consisted in the burning out of an eye, the punishment will be more strictly the same, if it be effected by burning rather than cutting out the eye of the delinquent.

The great merit of the law of retaliation is its simplicity. If it were capable of universal adoption, the whole penal code would be contained in one law:—"Let every offender suffer an evil similar to that which he has inflicted."

No other imaginable plan can, for its extent, find so easy an entrance into the apprehension, or sit so easy on the memory. The rule is at once so short and so expressive, that he who has once heard it, is not likely to forget it, or ever to think of a crime, but he must think also of its punishment. The stronger the temptation to commit an offence, the more likely is its punishment to be an object of dread. Thus the defence is erected on the side of danger.

One advantage that cannot be denied to this mode of punishment, is its popularity; requiring little expense of thought, it will generally be found to possess the judgment of the multitude in its favour. Should they, in any instance, be disposed to quarrel with it, they will still be ready enough, probably, to own it to be consonant to justice: but that justice, they will say, is rigid justice, or, to vary the jargon, justice in the abstract. All this while, with these phrases on their lips, they would perhaps prefer a milder punishment, as being more consonant to mercy, and, upon the whole, more conducive to the general happiness—as if justice, and especially penal justice, were something distinct from, and adverse to, that happiness. When, however, it happens not to give disgust by its severity, nothing can be more popular than this mode of punishment. This may be seen in the case of murder, with respect to which the attachment to this mode of punishment is warm and general. Blood (as the phrase is) will have blood. Unless a murderer be punished with death, the multitude of speculators can seldom bring themselves to think that the rules of justice are pursued.

The law of retaliation is, however, liable to a variety of objections, one of which, so far as it applies, is conclusive against its adoption. In a great variety of cases, it is physically inapplicable. Without descending far into detail, a few instances may suffice as examples. In the first place, it can never be applied when the offence is merely of a public nature—the characteristic quality of such offences being, that no assignable individual is hurt by them. If a man has been guilty of high treason, or has engaged in criminal correspondence with an enemy, or has, from cowardice, abandoned the defence of a post entrusted to him; how would it be possible to make him suffer an evil similar to that of which he has been the cause?

It is equally inapplicable to offences of the semi-public class—to offences which affect a certain district, or particular class of the community. The mischief of these offences often consists in alarm and danger, which do not affect one individual alone, and therefore do not present any opportunity for the exercise of retaliation.

With respect to self-regarding offences, consisting of acts which offend against morality, the application of this law would be absurd. The individual has chosen to perform the act; to do the same thing to him, would not be to punish him.

In offences against reputation, consisting, for instance, in the propagation of false reports affecting the character, it would be useless as a punishment to direct a similar false report to be propagated affecting the character of the delinquent. The like evil would not result from the circulation of what was acknowledged to be false.

In offences against property, the punishment of retaliation would at all times be defective in point of exemplarity and efficacy, and, in many cases, altogether inapplicable; those who are most apt to injure others in this respect, being, by their poverty, unable to suffer in a similar manner.

For a similar reason, it cannot be constantly applied to offences affecting the civil condition of individuals, to say nothing of the reasons that might render it ineligible, if it were possible to be applied.

These exceptions reduce its possible field of action to a very small extent, the only

classes of offences to which it will be found applicable, with any degree of constancy, are those that affect the person; and even here must be assumed, what scarcely ever exists, a perfect identity of circumstances. Even in this very limited class of cases, it would be found to err on the side of excessive severity. Its radical defect is, its inflexibility. The law ought so to apportion the punishment as to meet the several circumstances of aggravation or extenuation that may be found in the offence: retaliation is altogether incompatible with any such apportionment.

The class of people among whom this mode of punishment is most likely to be popular, are those of a vindictive character. Mahomet found it established among the Arabians; and has adopted it in the Koran, with a degree of approbation, that marks the extent of his talent for legislation: — "O you who have a heart, you will find in the law of retaliation, and in the fear that accompanies it, universal security."—(Vol. I. ch. ii. *On the Law.*) Either from weakness or ignorance, he encouraged the prevailing vice, which he ought to have checked.

CHAPTER X.

OF POPULARITY.

To prove that an institution is agreeable to the principle of utility, is to prove, as far as can be proved, that the people *ought* to like it: but whether they *will* like it or no after all, is another question. They would like it if, in their judgments, they suffered themselves to be uniformly and exclusively governed by that principle. By this principle they do govern themselves in proportion as they are humanized and enlightened: accordingly, the deference they pay to its dictates is more uniform in this intelligent and favoured country than perhaps in any other. I speak here, taking the great mass of the people upon this occasion, as they ought to be taken upon every occasion, into the account, and not confining my views, as is too commonly the case, to men of rank and education.

Even in this country, however, their acquiescence is far from being as yet altogether uniform and undeviating: in some instances their judgments are still warped by antipathies or prejudices unconnected with the principle of utility, and therefore irreconcilable to reason. They are apt to bear antipathy to certain offences, without regard to even their imputed mischievousness, and to entertain a prejudice against certain punishments, without regard to their eligibility with respect to the ends of punishment.

The variety of capricious objections to which each particular mode of punishment is exposed, has no other limits than the fecundity of the imagination: with some slight exceptions, they may however be ranged under one or other of the following heads:— *Liberty — Decency — Religion — Humanity.* What I mean by a capricious objection, is an objection which derives the whole of its apparent value from the impression that is apt to be made by the use of those hallowed expressions: the caprice consists in employing them in a perverted sense.

1. *Liberty.* — Under this head there is little to be said. All punishment is an infringement on liberty: no one submits to it but from compulsion. Enthusiasts, however, are not wanting, who, without regarding this circumstance, condemn certain modes of punishment, as, for example, imprisonment accompanied with penal labour, as a violation of the natural rights of man. In a free country like this, say they, it ought not to be tolerated, that even malefactors should be reduced to a state of slavery: the precedent is dangerous and pernicious; none but men groaning under a despotic government can endure the sight of galley-slaves.

When the establishment of the penitentiary system was proposed, this objection was echoed and insisted on, in a variety of publications that appeared on that occasion. Examine this senseless clamour: it will resolve itself into a declaration, that liberty ought to be left to those that abuse it, and that the liberty of malefactors is an essential part of the liberty of honest men.

2. *Decency.* — Objections drawn from the topics of decency are confined to those punishments, of which the effect is to render those parts which it is inconsistent with decency to expose, the objects of sight or of conversation.

Who can doubt, that in all punishments, care should be taken that no offence be given to modesty. But modesty, like other virtues, is valuable only in proportion to its utility. When the punishment is the most appropriate, though not either in its description or its execution altogether reconcileable with modesty, this circumstance ought not, as it appears to me, to stand in the way of the attainment of any object of greater utility. Castration, for example, seems the most appropriate punishment in the case of rape; that is to say, the best adapted to produce a strong impression on the mind at the moment of temptation. Is it expedient, then, on account of such scruples of modesty, that another punishment, as, for example, death, should be employed, which is less exemplary, and, consequently, less efficacious?*

* It is said, that in one of the cities of Greece, among the young women, instigated by I know not what disease of the imagination, the practice of suicide was for a time extremely prevalent. The

3. *Religion*— Among Christians there are some sects who conceive that the punishment of death is unlawful: life, say they, is the gift of God, and man is forbidden to take it away.

We shall find in the next book, that very cogent reasons are not wanting for altogether abolishing capital punishment, or, at most, for confining it to extraordinary cases. But this pretence of unlawfulness is a reason drawn from false principles.

Unlawful means *contrary to some law.* Those who, upon the occasion in question, apply this expression to the punishment of death, believe themselves, or endeavour to make others believe, that it is contrary to some divine law: this divine law is either revealed or unrevealed; if it be revealed, it must be to be found in the texts of those books which are understood to contain the expressions of God's will; but as there exists no such text in the New Testament, and as the Jewish law expressly ordains capital punishment, the partisans of this opinion must have recourse to some divine law not revealed —to a natural law; that is to say, to a law deduced from the supposed will of God.

But if we presume that God wills anything, we must suppose that he has a reason for so doing, a reason worthy of himself, which can only be the greatest happiness of his creatures. In this point of view, therefore, the divine will cannot require anything inconsistent with general utility.

If it can be pretended that God can have any will not consistent with utility, his will becomes a fantastic and delusive principle, in which the ravings of enthusiasm, and the extravagancies of superstition, will find sanction and authority.

In many cases, religion has been to such a degree perverted, as to become a bar to the execution of penal laws; as in the case of sanctuaries opened for criminals, in the Romish churches.

Theodosius I. forbade all criminal proceedings during Lent, alleging, as a reason, that the judges ought not to punish the crimes of others whilst they were imploring the divine forgiveness for their own transgressions. Valentinian I. directed that at Easter all prisoners should be discharged, except those that were accused of the most malignant offences.

Constantine prohibited, by law, the branding criminals on the face, alleging, that it is a violation of the law of nature to disfigure the majesty of the human face—the majesty of the face of a scoundrel!

The Inquisition, says Bayle, that it might not violate the maxim, *Ecclesia non novit sanguinem*, condemned its victims to be burnt alive. Religion has had its quibbles as well as the law.

4. *Humanity.*— Attend not to the sophistries of reason, which often deceive, but be governed by your hearts, which will always lead you to right. I reject, without hesitation, the punishment you propose: it violates natural feelings, it harrows up the susceptible mind, it is tyrannical and cruel. Such is the language of your sentimental orators.

But abolish any one penal law, merely because it is repugnant to the feelings of a humane heart, and, if consistent, you abolish the whole penal code: there is not one of its provisions that does not, in a more or less painful degree, wound the sensibility.

All punishment is in itself necessarily odious: if it were not dreaded, it would not effect its purpose; it can never be contemplated with approbation, but when considered in connexion with the prevention of the crime against which it is denounced.

I reject sentiment as an absolute judge, but under the control of reason it may not be a useless monitor. When a penal dispensation is revolting to the public feeling, this is not of itself a sufficient reason for rejecting it, but it is a reason for subjecting it to a rigorous scrutiny. If it deserves the antipathy it excites, the causes of that antipathy may be easily detected. We shall find that the punishment in question is mis-seated, or superfluous, or disproportionate to the offence, or that it has a tendency to produce more mischief than it prevents. By this means we arrive at the seat of the error. Sentiment excites to reflection, and reflection detects the impropriety of the law.

The species of punishment that command the largest share of public approbation are such as are analogous to the offence. Punishments of this description are commonly considered just and equitable; but what is the foundation of this justice and equity I know not. The delinquent suffers the same evil he has caused: ought the law to imitate the example it condemns? ought the judge to imitate the malefactor in his wickedness? ought a solemn act of justice to be the same in kind as an act of criminality?

This circumstance satisfies the multitude: the mouth of the criminal is stopped, and he cannot accuse the law of severity, without at the same time being equally self-condemned.

Fortunately, the same bent of the imagination that renders this mode of punishment

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The magistrates, alarmed by its frequency, ordered that, as a sort of posthumous punishment, their bodies, in a state of nudity, should be drawn through the public places. Into the truth of the relation, it is needless to inquire: but the narrator adds, the offence thenceforth altogether ceased. Here, then, is an instance of the utility of a law offensive to modesty, proved by its efficacy: for what higher degree of perfection can be looked for in any penal law than that of preventing the offence?

popular, renders it at the same time appropriate. The analogy that presents itself to the people, presents itself at the moment of temptation to the delinquent, and renders it a peculiar object of dread.

It is of importance to detect and expose erroneous conceptions, even when they happen to accord with the principle of utility. The coincidence is a mere accident; and whoever on any one occasion forms his judgment, without reference to this principle, prepares himself upon any other to decide in contradiction to it. There will be no safe and steady guide for the understanding in its progress, till men shall have learnt to trust to this principle alone, to the exclusion of all others. When the judgment is to decide, the use of laudatory or vituperative expressions is the mere babbling of children: they ought to be avoided in all philosophical disquisitions, where the object ought to be to instruct and convince the understanding, and not to inflame the passions.

BOOK II.

OF CORPORAL PUNISHMENTS.

CHAPTER I.

SIMPLE AFFLICTIVE* PUNISHMENTS.

A PUNISHMENT is simply afflictive when the object aimed at is to produce immediate temporary suffering, and is so called to distinguish it from other classes of corporeal punishments, in which the suffering produced is designed to be more permanent. Simple afflictive punishments are distinguished from one another by three principal circumstances: the part affected, the nature of the instrument, and the manner of its application.

To enumerate all the varieties of punishment which might be produced by the combination of these different circumstances, would be an useless, as well as an endless task. To enumerate the several parts of a man's body in which he is liable to be made to suffer, would be to give a complete body of anatomy. To enumerate the several instruments by the application of which he might be made to suffer, would be to give a complete body of natural history. To attempt to enumerate the different manners in which those instruments may be applied to such a purpose, would be to attempt to exhaust the inexhaustible variety of motions and situations.

Among the indefinite multitude of punishments of this kind that might be imagined and described, it will answer every purpose if we mention some of those which have been in use in this and other countries.

The most obvious method of inflicting this species of punishment, and which has been most commonly used, consists in exposing the body to blows or stripes. When these are inflicted with a flexible instrument, the operation is called whipping: when a less flexible instrument is employed, the effects are different; but the operation is seldom distinguished by another name.

In Italy, and particularly in Naples, there is a method, not uncommon, of punishing pickpockets, called the *Strappado*. It consists in raising the offender by his arms, by means of an engine like a crane, to a certain height, and then letting him fall, but suddenly stopping his descent before he reaches the ground. The momentum which his body has acquired in the descent is thus made to bear upon his arms, and the consequence generally is, that they are dislocated at the shoulder: to prevent the permanent evil consequences, a surgeon is then employed to reset them.

There were formerly in England two kinds of punishment of this class, discarded now even from the military code, in which they were longest retained: the one called *Picketing*, which consisted in suspending the offender in such manner that the weight of his body was supported principally by a spike, on which he was made to stand with one foot: the other, the *Wooden Horse*, as it was called, was a narrow ledge or board, on which the individual was made to *sit* astride; and the inconvenience of which was increased by suspending weights to his legs.

Another species of punishment formerly practised in this country, but now rarely used, consisted in subjecting the patient to frequent immersions in water, called ducking. The individual was fastened to a chair or stool, called the ducking-stool, and plunged repeatedly. In this case, the punishment was not of the acute, but of the uneasy kind. The physical uneasiness arises partly from the cold, partly from the temporary stoppage of respiration. It has something of the ridi-

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* I am sensible how imperfectly the word *afflictive* is calculated to express the particular kind of punishment I have here employed it to express, in contradistinction to all others; but I could find no other word in the language that would do it better. It may be some reason for employing it thus, that in French it is employed in a sense nearly, if not altogether, as confined: [a] and the pains it is the nature of the punishments in question to produce, Cicero expresses by a word of the same root:—"*Adflictatio*," says that orator in his Tusculan Disputations, when he is defining and distinguishing the several sorts of pain, "*est ægritudo cum vexatione corporis.*" [b]

[a] Causes Celèbres, chap. iv. p. 229.—Ed. Amsterd. 1764.

[b] Lib. iv. c. 8.

culous mixed with it, and was most generally applied to scolding women, whose tongues disturbed their neighbours. It is a relic of the simplicity of the olden time. It is still occasionally resorted to, when the people take the administration of the laws into their own hands; and is not uncommonly the fate of the pickpocket who is detected at a fair or other place of promiscuous resort.

The powers of invention have been principally employed in devising instruments for the production of pain, by those tribunals which have sought to extort proofs of his criminality from the individual suspected. They have been prepared for all parts of the body, according as they have wished to stretch, to distort, or to dislocate them. Screws for compressing the thumbs; straight boots for compressing the shins, with wedges driven in by a mallet; the rack for either compressing or extending the limbs; all of which might be regulated so as to produce every possible degree of pain.

Suffocation was produced by drenching, and was practised by tying a wet linen cloth over the mouth and nostrils of the individual, and continually supplying it with water, in such manner, that every time the individual breathed, he was obliged to swallow a portion of water, till his stomach became visibly distended. In the infamous transactions of the Dutch at Amboyna, this species of torture was practised upon the English who fell into their power.

It would be useless to pursue this afflicting detail any further. How variously soever the causes may be diversified, the effect is still one and the same, viz. organical pain, whether of the acute or uneasy kind. This effect is common to all these modes of punishment. There are other points in which they may differ: — 1. One of them may carry the intensity of the pain to a higher or lower pitch than it could be carried by another. 2. One may be purer from consequences which, for the purpose in question, it may or may not be intended to produce.

These consequences may be — 1. The continuance of the organical pain itself beyond the time of applying the instrument; 2. The production of any of those other ill consequences which constitute the other kinds of corporeal punishment; 3. The subjecting the party to ignominy.

In the choice of punishment, these circumstances, how little soever they are attended to in practice, are of the highest importance.

It would be altogether useless, not to say mischievous, to introduce into the penal code a great variety of modes of inflicting this species of punishment. Whipping — the mode which has been most commonly in use — would, if proper care were taken to give to it every degree of intensity, be sufficient if it were the only one. Analogy, however, in certain cases, recommends the employment of other modes. The multiplication of the instruments of punishment, when not thus justified, tends only to render the laws odious.

Among other works undertaken by order of the Empress Maria Theresa for the amelioration of the laws, a description was compiled of the various methods of inflicting torture and punishment in the Austrian dominions. It formed a large folio volume, in which not only all the instruments were described, and represented by engravings, but a detailed account was given of the manipulations of the executioners. This book was only exposed for sale for a few days, Prince Kaunitz, the prime minister, having caused it to be suppressed. He was apprehensive, and certainly not without reason, that the sight of such a work would only inspire a horror of the laws. This objection fell with its whole force upon the instruments for the infliction of torture, which has since been abolished in all the Austrian dominions. It is highly probable that the publication of this work contributed to produce this happy event. If so, few books have done more good to the world, if compared with the time they continued in it.

A valuable service would be rendered to society by the individual who, being properly qualified for the task, should examine the effects produced by these different modes of punishment, and should point out the greater or smaller evil consequences resulting from contusions produced by blows with a rope, or lacerations by whips, &c. In Turkey, punishment is inflicted by beating the soles of the feet: whether the consequences are more or less severe, I know not. It is perhaps from some notion of modesty that the Turks have confined the application of punishment to this part of the human body.

If the suffering produced by a punishment of this class is rendered but little more than momentary, it will neither be sufficiently exemplary to affect the spectators, nor sufficiently efficacious to intimidate the offenders. There will be little in the chastisement but the ignominy attached to it; and this would have but little effect upon that class of delinquents upon whom such punishments are generally inflicted; the quantity of suffering ought, therefore, if possible, to be regulated by the laws.

Of all these different modes of punishment, whipping is the most frequently in use; but in whipping, not even the qualities of the instrument* are ascertained by written law:

* The Chinese, owing perhaps to the extensive use they make of this mode of punishment, have attempted, by fixing the length and breadth at the extremities, and weight of the bamboo, to render uniform the amount of the suffering pro-

while the quantity of force to be employed in its application is altogether entrusted to the caprice of the executioner. He may make the punishment as trifling or as severe as he pleases. He may derive from this power a source of revenue, so that the offender will be punished, not in proportion to his offence, but to his poverty. If he has been unfortunate, and not able to secure his plunder, or honest, and has voluntarily given it up, and thus has nothing left to make a sop for Cerberus, he suffers the rigour — perhaps more than the rigour — of the law. Good fortune, and perseverance in dishonesty, would have enabled him to buy indulgence.

The following contrivance would, in a measure, obviate this inconvenience: — A machine might be made, which should put in motion certain elastic rods of cane or whalebone, the number and size of which might be determined by the law: the body of the delinquent might be subjected to the strokes of these rods, and the force and rapidity with which they should be applied, might be prescribed by the judge: thus everything which is arbitrary might be removed. A public officer, of more responsible character than the common executioner, might preside over the infliction of the punishment; and when there were many delinquents to be punished, his time might be saved, and the terror of the scene heightened, without increasing the actual suffering, by increasing the number of the machines, and subjecting all the offenders to punishment at the same time.

§ 2. *Examination of Simple Afflictive Punishments.*

The examination of a punishment consists in comparing it successively with each of the qualities which have been pointed out as desirable in a lot of punishment, that it may be observed in what degree some are possessed and the others wanted; and whether those which it possesses are more important than those which it wants; that is to say, whether it is well adapted for the attainment of the desired end.

It will be remembered, that the several qualities desirable in a lot of punishment are — variability, equability, commensurability, characteristicalness, exemplarity, frugality, subserviency to reformation, efficiency with respect to disablement, subserviency to compensation, popularity, and remissibility.

That any species of punishment does not possess the whole of these qualities, is not a sufficient reason for its rejection: they are not all of equal importance, and indeed no one species of punishment will perhaps ever be found in which they are all united.

Simple afflictive punishments are capable of great variability: they may be moderated or increased at will. Their effects, however, are far from equable: the same punishment will not produce the same effects when applied to both sexes — when applied to a stout young man, and an infirm old man. These punishments are almost always attended with a portion of ignominy, and this does not always increase with the organic pain, but principally depends upon the condition of the offender. For this reason, there is scarcely a punishment of this description which would be esteemed slight, if inflicted upon a gentleman.

It was inattention to this circumstance that was one cause of the dissatisfaction occasioned by the Stat. 10 Geo. III., called the Dog Act, passed to restrain the stealing of dogs: among the punishments appointed was that of whipping. There is one thing in the nature of this species of property which renders the stealing of it less incompatible with the character of a gentleman than any other kind of theft. It is apt, therefore, to meet with indulgence from the moral sanction, for the same reason that enticing away a servant is not considered as a crime, on account of the rational qualities of the subject of property in these cases. An individual also may be innocent, notwithstanding appearances are against him. A dog is susceptible of volition, and even of strong social affections, and may have followed a new master without having been enticed.

The same inattention has been observed to be remarkably prevalent throughout the whole system of penal jurisprudence in Russia. In the reign which preceded that of the mild and intelligent Catherine II. neither rank nor sex bestowed an exemption from the punishment of whipping. The institutions of Poland were also chargeable with the same roughness; and it was no uncommon thing for the maid of honour of a Polish princess to be disciplined in public by the *Maître d' Hôtel.*

Nothing more completely proves the degradation of the Chinese than the whips which are constantly used by the police. The mandarins of the first class, the princes of the blood, are subjected to the bamboo, as well as the peasant.

The principal merit of simple afflictive punishments, is their exemplarity. All that is suffered by the delinquent during their infliction may be exhibited to the public, and the class of spectators which would be attracted by such exhibitions, consists, for the

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duced by this mode of punishment: but one material circumstance that they have omitted to regulate, and certainly the most difficult to regulate, is the degree of force with which the stroke is to be applied; an omission that leaves the uncertainty nearly in the same state as in this country. — See the *Penal Code of China*, translated by Sir G. T. Staunton, p. 24.

most part, of those upon whom the impression they are calculated to produce would be most salutary.

Such are the most striking points to be observed with respect to these punishments. There is little particular to be remarked under the other heads. They are of little efficiency as to intimidation or reformation, with the exception of one particular species —*penitential diet;* which, well managed, may possess great moral efficacy. But as this is naturally connected with the subject of imprisonment, the consideration of it is deferred for the present.

CHAPTER II.

OF COMPLEX AFFLICTIVE PUNISHMENTS.

UNDER the name of complex afflictive punishments, may be included those corporeal punishments, of which the principal effect consists in the distant and durable consequences of the act of punishment. They cannot be included under one title. They include three species, very different the one from the other in their nature and their importance.

The permanent consequences of an afflictive punishment may consist in the alteration, the destruction, or suspension of the properties of a part of the body.

The properties of a part of the body consist of its visible qualities, as of colour and figure, and its uses.

Of these three distinct kinds of punishments, the first affects the exterior of the person, its visible qualities: the second affects the use of the organic faculties, without destroying the organ itself; the third destroys the organ itself.*

§ 1. *Of Deformation, or Punishments which alter the Exterior of the Person.*

It was an ingenious idea in the first legislator who invented these external and permanently visible punishments, — punishments which are inflicted without destroying any organ — without mutilation — often without physical pain; in all cases, without any other pain than what is absolutely necessary, — which affect only the appearance of the criminal, and render that appearance less agreeable — which would not be punishments if they were not indications of his crimes.

The visible qualities of an object are its colour and figure; there are therefore two methods of altering them: 1. Discolouration; 2. Disfiguration.

1. Discolouration may be temporary or permanent. When temporary, it may be produced by vegetable or mineral dyes. I am not acquainted with an instance of its use as a punishment. It has always appeared to me, that it might be very usefully employed as a precaution to hinder the escape of certain offenders, whilst they are undergoing other punishments.

Permanent discolouration might be produced by tatooing; the only method at present in use is branding.†

Tatooing is performed by perforating the skin with a bundle of sharp-pointed instruments, and subsequently filling the punctures with coloured powder. Of all methods of discolouration, this is the most striking and the least painful. It was practised by the ancient Picts, and other savage nations, for the purpose of ornament.

Judicial branding is effected by the application of a hot iron, the end of which has the form which it is desired should be left imprinted on the skin. This punishment is appointed for many offences in England, and among other European nations. How far this mark is permanent and distinct, I know not; but every one must have observed that accidental burnings often leave only a slight cicatrix — a scarcely sensible alteration in the colour and texture of the skin.

If it is desired to produce deformity, a part of the body should be chosen which is exposed to view, as the hand or the face; but if the object of the punishment is only to mark a conviction of a first offence, and to render the individual recognisable in case of a relapse, it will be better that the mark should be impressed upon some part of the body less ordinarily in view, whereby he will be spared the torment of its infamy, without taking away his desire to avoid falling again into the hands of justice.

2. Disfigurement may in the same manner be either permanent or transient. It may be performed either on the person, or only on its dress.

When confined to the dress, it is not properly called disfigurement; but, by a natural association of ideas, it has the same effect. To this head may be referred the melancholy robes and frightful dresses made use of by the Inquisition, to give to those who suffer in public a hideous or terrible appearance. Some were clothed in cloaks painted to represent flames; others were covered with

* The first may be included under the general name of *Deformation;* the second under the name of *Dishabilitation:* they render the organ impotent and useless. The third has already a proper name — *Mutilation.*

† Scarification and corrosion might be employed for the same purpose. The first is attended with this inconvenience, — the form which the cicatrix will take cannot be determined beforehand; it may leave none, or an accidental incision may leave a similar one. Corrosion by chemical caustics may not be liable to the same inconvenience; but its effects have not been tried.

figures of demons, and different emblems of future torments.

Shaving the head has been a punishment formerly used. It was part of the penance imposed upon adulterous women by the ancient French laws.

The Chinese attach great importance to the length of their nails; cutting them might therefore be used as a penal disfigurement. Shaving the beard might be thus employed among the Russian peasants, or a part of the Jews.

The permanent means of disfigurement are more limited. The only ones which have been in use, and which may yet be employed in certain countries, were applied to certain parts of the head, which may be altered without destroying the functions which depend on those parts. The common law of England directs the nostrils to be slit, or the ears cut off, as the punishment for certain offences. The first of these punishments has fallen into disuse; the second has been rarely employed in the last century. In the works of Pope, and his contemporary writers, may be seen how far their malignity was pleased by allusions to this species of punishment, which had been applied to the author of a libel in their times.

The cutting off and slitting of the nose, the eyelids, and the ears, were once in common use in Russia, without distinction of sex or rank. They were the common accompaniments of the knout and exile: but it ought to be observed that the punishment of death was very rare.

§ 2. *Of Disablement, or Punishments consisting in disabling an Organ.*

To disable an organ is either to suspend or destroy its use, without destroying the organ itself.

It is not necessary here to enumerate all the organs, nor all the methods by which they may be rendered useless. We have already seen, that it would not be useful to have recourse to a great variety of afflictive punishments, and that there would be many inconveniences in so doing. If we were to follow the law of retaliation, the catalogue of possible punishments would be the same as that of the possible offences of this kind.

1. *The Visual Organ*, — the use of which may be suspended by chemical applications, or by mechanical means, as with a mask or bandage. The visual faculty may also be destroyed by chemical or mechanical means.

No jurisprudence in Europe has made use of this punishment. It has heretofore been employed at Constantinople, under the Greek emperors, less as a punishment, it is true, than as a politic method of rendering a prince incapable of reigning. The operation consisted in passing a red hot plate of metal before the eyes.

2. *The Organ of Hearing.* — This faculty may be destroyed by destroying the tympanum. A temporary deafness may be produced by filling the passage of the ears with wax. As a legal punishment, I know of no instance of its use.

3. *The Organ of Speech.* — Gagging has more often been employed as a means of precaution against certain delinquents, rather than as a method of punishment. General Lally was sent to his punishment with a gag in his mouth; and this odious precaution perhaps only served to turn public opinion against his judges, when his character was re-established. It has sometimes been employed in military prisons. It has the merit of analogy, when the offence consists in the abuse of the faculty of speech.

Gagging is sometimes performed by fixing a wedge between the jaws, which are rendered immoveable; sometimes by forcing a ball into the mouth, &c.

4. *The Hands and Feet.*—I shall not speak of the various methods by which these members may be rendered for ever useless. If it were necessary to be done, it would not be difficult to accomplish.

Handcuffs are rings of metal, into which the wrists are thrust, and which are connected together with a bar or chain. This apparatus completely hinders a certain number of movements, and might be employed so as to prevent them all.

Fetters are rings of metal, into which the legs are fixed, united in the same manner by a chain or bar, according to the species of restraint which it is desired to produce. Handcuffs and fetters are often employed conjointly. Universal use is made of these two methods, sometimes as a punishment, properly so called, but more frequently to prevent the escape of a prisoner.

The *pillory* is a plank fixed horizontally upon a pivot, on which it turns, and in which plank there are openings, into which the head and the hands of the individual are put, that he may be exposed to the multitude. I say to the gaze of the multitude — such is the intention of the law; but it not unfrequently happens, that persons so exposed are exposed to the outrages of the populace, to which they are thus delivered up without defence, and then the punishment changes its nature: — its severity depends upon the caprice of a crowd of butchers. The victim — for such he then becomes — covered with filth, his countenance bruised and bloody, his teeth broken, his eyes puffed up and closed, no longer can be recognised. The police, at least in England, used to see this disorder, nor seek to restrain it, and perhaps would have been unable to restrain it. A simple iron trellis, in

the form of a cage, placed around the pillory would, however, suffice for stopping at least all those missiles which might inflict any dangerous blows upon the body.

The *carcan*, a kind of portable pillory, is a species of punishment which has been used in many countries, and very frequently in China. It consists of a wooden collar, placed horizontally on the shoulders, which the delinquent is obliged to carry without relaxation for a longer or shorter time.

§ 3. *Of Mutilations.*

I understand by *mutilation*, the extirpation of an external part of the human body, endowed with a distinct power of movement, or a specific function, of which the loss is not necessarily followed by the loss of life, as the eyes, the tongue, the hands, &c.

The extirpation of the nose and of the ears is not properly called mutilation, because it is not upon the external part of these organs that the exercise of their functions depends; they protect and assist that exercise, but they do not exercise these functions. There is, therefore, a difference between that mutilation which causes a total loss of the organ, and that which only destroys its envelope. The latter is only a disfigurement, which may be partly repaired by art.

Every body knows how frequently mutilations were formerly employed in the greater number of penal systems. There is no species of them which has not been practised in England, even in times sufficiently modern. The punishment of death might be commuted for that of mutilation under the common law. By a statute passed under Henry VIII. the offence of maliciously drawing blood in the palace, where the king resided, was punished by the loss of the right hand. By a statute of Elizabeth, the exportation of sheep was punished by the amputation of the left hand. Since that time, however, all these punishments have fallen into disuse, and mutilations may now be considered as banished from the penal code of Great Britain.

Examination of Complex Afflictive Punishments.

The effects of simple afflictive punishments are easily estimated, because their consequences are all similar in quality, and immediately produced. The effects of all other punishments are not ascertained without great difficulties, because their consequences are greatly diversified, are liable to great uncertainty, and are often remote. Simple afflictive punishments must always be borne by the parties on whom they are inflicted: all other punishments are deficient in point of certainty: the more remote their consequences, the more these consequences escape the notice of those who are deficient in foresight and reflection.

Around a simple afflictive punishment a circle may be drawn, which shall inclose the whole mischief of the punishment: around all other punishments the mischief extends in circles, the extent of which is not, and cannot be marked out. It is mischief in the abstract, mischief uncertain and universal, which cannot be pointed out with precision. When the effects of punishments are thus uncertain, there is much less ground for choice; for the effects of one punishment may be the same with those of another, the same consequences often resulting from very different punishments. The choice must therefore be directed by probability, and be governed by the presumption that certain punishments will more probably produce certain penal consequences than any other.

Independently of the bodily sufferings resulting from them, punishments which affect the exterior of the person often produce two disadvantageous effects: the one physical — the individual may become an object of *disgust;* the other moral — he may become an object of *contempt:* they may produce a *loss of beauty or a loss of reputation.*

One of these punishments, which has a greater moral than physical effect, is a mark producing only a change of colour, and the impression of a character upon the skin; but this mark is an attestation that the individual has been guilty of some act to which contempt is attached, and the effect of contempt is to diminish good-will, the principle that produces all the free and gratuitous services that men render to one another: but in our present state of continual dependence upon each other, that which diminishes the good-will of others towards us, includes within itself an indefinite multitude of privations.*

When such a mark is inflicted on account of a crime, it is essential that a character should be given to it, which shall clearly announce the intention with which it was imposed, and which cannot be confounded with cicatrices of wounds or accidental marks.

* Stedman relates a fact which proves what has been above said of the indefinite consequences of these punishments. Speaking of a Frenchman, named *Destrades*, who had introduced the culture of indigo into Surinam, and who, during many years, had enjoyed general esteem in that colony, he states, that being at the house of one of his friends in Demerara, he became ill of an abscess, which formed in his shoulder. He would not suffer it to be examined: it became dangerously worse, but his resistance remained still the same: at last, not hoping for a cure, he put an end to his life with a pistol-ball, when the secret was revealed: it was found that his shoulder was marked with a letter *V*, or *Voleur*.— *Narrative of an Expedition against the Revolted Negroes of Surinam, by Major Stedman*, ch. 27.

A penal mark ought to have a determinate figure; and the most suitable, as well as the most common, is the initial letter of the name of the crime. Among the Romans, slanderers were marked on the forehead with the letter K. In England, for homicide, committed after provocation, offenders were marked in the hand with the letter M (for manslaughter), and thieves with the letter T. In France, the mark for galley-slaves was composed of the three letters GAL.

In Poland, it was the custom to add a symbolical expression: the initial letter of the crime was inclosed in the figure of a gallows. In India, among the Gentoos, a great number of burlesque symbolical figures are employed.

A more lenient method, which may be referred to the same head, is a practice too little used, of giving to offenders a particular dress, which serves as a livery of crime. At Hanau, in Germany, persons condemned to labour on the public works were distinguished by a black sleeve in a white coat. It is an expedient which has for its object the prevention of their escape; as a mark of infamy, it is an addition to the punishment.

On the score of frugality, deforming punishments are not liable to any objection; disablement and mutilation are. If the effect of either is to prevent a man getting his livelihood by his own labour, and he has no sufficient income of his own, he must either be left to perish, or be supplied with the means of subsistence: If he were left to perish, the punishment would not be mere disablement or mutilation, but death: if he be supported by the labour of others, that labour must either be bestowed gratis, as would be the case if he were supported on the charity of relations and friends; or paid for, at public cost: in either case, it is a charge upon the public. This consideration might of itself be considered a conclusive objection against the application of these modes of punishment for offences that are apt to be frequently committed, such as theft or smuggling; the objection applies, however, in its full force, to such of these modes of punishment only as have the effect of depriving the particular individual in question of the means of gaining his livelihood.

In respect of remissibility, they are also eminently defective — a consideration which affords an additional reason for making a very sparing use of them.

In respect also of *variability*, these punishments are scarcely in a less degree defective. The loss of the eyes, or of the hand, is not, to a man who can neither read or write, the same degree of punishment as it would be to a painter, or an author. Yet, however different in each instance may be the degree of suffering produced by the mass of evil to which the infliction of the punishment in question gives birth, all who are subject to it will find themselves more or less affected: of these inequalities, and therefore of the aggregate amount of the punishment in each particular instance, it is impossible to form any estimate; it depends on the sensibility of the delinquent, and other circumstances, which cannot be foreseen. By a slothful man, the loss of a hand might not be regarded as a very severe punishment: it has not been uncommon for men to mutilate or disable themselves to avoid serving in the army.

In point of variability, the several classes of punishment now before us, when considered all together, are not liable to much objection; there is a gradation from less to more, which runs through the whole of them. The loss of one finger is less painful than the loss of two, or of the whole hand; the loss of the hand is less than the loss of an arm. But when these punishments are considered singly, the gradation disappears. The particular mutilation directed by the law, can neither be increased or diminished, that it may be accommodated to the different circumstances of the crime or of the delinquent. This objection recurs again under the head of Equability. The same nominal punishment will not always be the same real punishment.

In respect of *exemplarity*, the punishments in question possess this property in a higher degree than simple afflictive punishments. This latter species of punishment not being naturally attended with any distant consequences (their infamy excepted), the whole quantity of pain it is calculated to produce is collected, as it were, into a point, and exposed at once to the eyes of the spectator; while of the other, on the contrary, the consequences are lasting, and are calculated perpetually to awaken in the minds of all, to whose eyes any person that has suffered this species of punishment may happen to present himself, the idea of the law itself, and of the sanction by which its observance is enforced. For this purpose it is necessary, however, as has been already observed, that the penal mark should be such as at first glance to be distinguished from any mark that may have been the result of accident — that misfortune may be protected from the imputation of guilt.

The next property to be desired in a mode of punishment, is subserviency to *reformation*. In this respect, the punishments under consideration, when temporary, have nothing in themselves that distinguishes them from any other mode of punishment: their subserviency to reformation is as their experienced magnitude. It is the infamy attendant on them that gives them those effects which are

apt in this respect to distinguish them to their disadvantage.

Infamy, when at an intense pitch, is apt to have this particular bad effect: it tends pretty strongly to force a man to persist in that depraved course of life by which the infamy was produced. When a man falls into any of those offences that the moral sanction is known to treat with extreme rigour, men are apt to suppose that the moral sanction has no hold upon him. His character, they say, is gone. They withdraw from him their confidence and good-will. He finds himself in a situation in which he has nothing to hope for from men, and for the same reason nothing to fear: he experiences the worst already. If, then, he depend upon his labour for subsistence, and his business is of such sort as requires confidence to be reposed in him, by losing that necessary portion of confidence he loses the means of providing himself with subsistence; his only remaining resources are then mendicity or depredation.

From these observations it follows, that mutilations ought to be reserved as punishments for the most mischievous offences, and as an accompaniment of perpetual imprisonment. An exception to this rule may perhaps be found in the case of rape, for which analogy most strongly recommends a punishment of this kind.

CHAPTER III.

OF RESTRICTIVE PUNISHMENTS — TERRITORIAL CONFINEMENT.

RESTRICTIVE punishments are those which restrain the faculties of the individual, by hindering him from receiving agreeable impressions, or from doing what he desires: they take from him his liberty with respect to certain enjoyments and certain acts.

Restrictive punishments are of two sorts, according to the method used in inflicting them. Some operate by moral restraint, others by physical restraint. Moral restraint takes place when the motive presented to the individual, to hinder him from doing the act which he wishes to perform, is only the fear of a superior punishment; for, in order to be efficacious, it is necessary that the punishment with which he is threatened must be greater than the simple pain of submitting to the restraint imposed upon him.

The punishment of restraint is applicable to all sorts of actions in general, but particularly to the faculty of *locomotion*. Everything which restrains the locomotive faculty, confines the individual; that is to say, shuts him up within certain limits, and may be called *territorial confinement*.

In this kind of punishment, the whole earth, in relation to the delinquent, is divided into two very unequal districts; the one of which is *open* to him, and the other *interdicted*.

If the place in which he is confined be a narrow space, surrounded with walls, and the doors of which are locked, it is imprisonment: if the district in which he be directed to remain is within the dominions of the state, the punishment may be called *relegation:* if it be without the dominions of the state, the punishment is called *banishment*.

The term *relegation* seems to imply, that the delinquent is sent out of the district in which he ordinarily resides. This punishment may consist in his confinement in that district where he ordinarily resides, and even in his own house. It may then be called *quasi imprisonment*.

If it refers to a particular district, which he is prohibited from entering, it is a sort of exclusion, which has not yet a proper name, but which may be called *local interdiction*.

Territorial confinement is the genus which includes five species: — imprisonment, quasi imprisonment, relegation, local interdiction, and banishment.

CHAPTER IV.

IMPRISONMENT.

IMPRISONMENT makes a much more extensive figure than any other kind of hardship that can be inflicted in the way of punishment. Every other kind of hardship (death alone excepted) may be inflicted for two purposes — *punishment* and *compulsion*. Imprisonment, besides these two purposes, may be employed for another — safe custody. When thus employed, it is not a punishment, properly so called; it is intended only to insure the forthcomingness of an individual suspected of having committed an offence, that he may be present to undergo the punishment appointed for that offence, if he be found guilty. When thus employed, it ought not to be more severe than is necessary to insure forthcomingness. Whatever exceeds this, is so much misery in waste.

When imprisonment is intended to operate as a punishment, it may be rendered more or less severe, according to the nature of the offence and the condition of the offender. It may be accompanied by forced labour, which may be imposed upon all; but it ought not to be so imposed without reference to the age, the rank, the sex, and the physical powers of the individuals. Other punishments, which may be employed in addition to hard labour, and of which we shall have occasion to speak in a future chapter, are — diet, solitude, and darkness.

When imprisonment is inflicted for the

purpose of *compulsion*, the severer it is the better, and that for various reasons.

When it is protracted, but slight, the danger is, that the prisoner may come by degrees to accommodate himself to it, till at last it ceases, in a manner, to operate upon him. This is found not uncommonly to be the case with insolvent debtors. In many of our gaols there are so many comforts to be had by those who have money to purchase them, that many a prisoner becomes in time tolerably well reconciled to his situation. When this is the case, the imprisonment can no longer be of use in any view.

The severer it is — I mean all along in point of intensity—the less of it, in point of magnitude, will be consumed upon the whole; that is, in point of intensity and duration taken together; the more favourable, in short, will it be to the sufferer: it will produce its effects at a cheaper rate. The same quantity of painful sensations, which, under the milder imprisonment, are diffused through a large mass of sensations, indifferent or pleasurable, being, in the severer imprisonment, brought together, will act with collected force, and produce a stronger impression: the same quantity of pain will therefore go farther this way than in any other. Add to this, that in this way the same quantity of suffering will not have so pernicious an influence on his future life. In the course of a tedious confinement, his mental faculties are debilitated, his habits of industry are weakened, his business runs into other channels, and many of those casual opportunities which might have afforded the means of improving his fortune, had he been at liberty to embrace them, are irrecoverably gone. These evils, which, though they may come eventually to be felt, are too distant and contingent to contribute anything beforehand to the impression it is intended to produce, are saved by placing the magnitude of the punishment in intensity rather than in duration.

By the fundamental constitution of man's nature, without anything being done by any one to produce a change in his situation, if left to himself, in a situation in which he is debarred from exercising the faculty of locomotion, he will in a short time become a prey to various evils, to the action of various causes producing various organical pains, which, sooner or later, are sure to end ultimately in death. If duration and neglect be added to imprisonment, it necessarily becomes a capital punishment. Since, therefore, it is followed by an infinite variety of evils which the individual is unable himself to guard against, and against which precautions must be taken by others to preserve him, it follows, that to form a just notion of imprisonment, it must be considered, not simply by itself, but in connexion with its different modes and consequences. We shall then see that, under the same name, very different punishments may be inflicted. Under a name which presents to the mind only the single circumstance of confinement in a particular place, imprisonment may include every possible evil; from those which necessarily follow in its train, rising from one degree of rigour to another, from one degree of atrocity to another, till it terminates in a most cruel death; and this without being intended by the legislator, but altogether arising from absolute negligence—negligence as easy to be explained, as it is difficult to be palliated.

We shall class under three heads the penal circumstances which result from this condition: — 1. *Necessary* inconveniences, which arise from the condition of a prisoner, and which form the essence of imprisonment: 2. *Accessory* inconveniences, which do not necessarily, but which very frequently follow in its train: 3. Inconveniences arising from *abuses*.

I. *Negative Evils, inseparable from Imprisonment.*

1. Privation of the pleasures which belong to the sight, arising from the diversity of objects in town and country.

2. Privation of the liberty of taking pleasurable exercises that require a large space, such as riding on horseback or in a carriage, hunting, shooting, &c.

3. Privation of those excursions which may be necessary even for health.

4. Privation of the liberty of partaking of public diversions.

5. Abridgment of the liberty of going out to enjoy agreeable society, as of relations, friends, or acquaintance, although they should be permitted to come to him.

6. Privation of the liberty, in some cases, of carrying on business for a livelihood, and abridgment of such liberty in all cases.

7. Privation of the liberty of exercising public offices of honour or trust.

8. Privation of accidental opportunities of advancing his fortune, obtaining patrons, forming friendships, obtaining a situation, or forming matrimonial alliances for himself or children.

Although these evils may in the first instance be purely negative, that is to say, privation of pleasures, it is evident that they bring in their train of consequences positive evils, such as the impairing of the health, and the impoverishment of the circumstances.

II. *Accessory Evils, commonly attendant on the Condition of a Prisoner.*

1. Confinement to disagreeable diet. The want of *sufficient* food for the purpose of nourishment, is a distinct mischief, which will come under another head.

2. Want of comfortable accommodations for repose—hard bedding, or straw, or nothing but the bare ground. This hardship alone has been thought to have been productive, in some instances, of disease, and even death.

3. Want of light—by the exclusion of the natural light of the sun by day, and the not furnishing or not permitting the introduction of any artificial means of producing light by night.

4. Total exclusion from society. This evil is carried to its height when a prisoner is not permitted to see his friends, his parents, his wife, or his children.

5. Forced obligation of mixing with a promiscuous assemblage of his fellow-prisoners.*

6. Privation of the implements of writing, for the purposes of correspondence: a useless severity, since everything which is written by a prisoner may be properly submitted to inspection. If ever this privation be justifiable, it is in cases of treason and other party crimes.

7. Forced idleness, by the refusal of all means of necessary occupation: as of the brushes of a painter, the tools of a watchmaker, or of books, &c. This has sometimes been carried to such a degree of rigour as to deprive prisoners of all amusement.

These different evils, which are so many positive evils in addition to the necessary evils of simple imprisonment, may be useful in penal and penitential imprisonment. We shall hereafter show in what manner they ought to be used. But with respect to the fifth evil, the forced obligation of mixing with a promiscuous assemblage of prisoners, it is always an evil, and an evil which cannot be obviated without a change in the system and construction of prisons.

We proceed to the consideration of evils purely abusive: of those which exist only by the negligence of the magistrates, but which necessarily exist, where precautions have not been taken to prevent their existence. We shall present two catalogues: one, of the evils; the other, of their remedies:—

EVILS.	REMEDIES.
1. Pains of hunger and thirst: *general debility—death.*	1. Sufficient nourishment.
2. Sensation of cold in various degrees of intensity: *stoppage of the circulation—mortification of the extremities*† *—death.*	2. Sufficient clothing, adapted to the climate and the season—fire.
3. Sensation of heat: *habitual debility—death.*	3. Shelter from the sun in hot weather—fresh air.
4. Sensation of damp and wetness: *fevers and other disorders—death.*	4. The ground everywhere covered with boards, or bricks, or stone—fresh air—tubes for conveying heated air.
5. Noisome smells, collections of putrifiable matter: *habitual debility—falling off of the members by gangrene—gaol-fever—contagious diseases—death.*	5. Fresh air—change of clothes—water and other implements of washing—fumigations—whitewashing the walls—medicines and medical assistance.
6. Pain or uneasiness resulting from the bites of vermin: *cutaneous diseases—want of sleep—debility—inflammation—fever—death.*	6. Chemical applications to destroy them—cleanliness—a person with proper implements for their destruction and removal.
7. Various diseases.	7. Medicines and medical advice.
8. Painful sensations arising from indelicate practices.	8. Partitions to keep the prisoners separate during the hour of rest, at least those of the one sex from those of the other.

* This inconvenience would be apt to be attended with effects of the most serious nature in the case of an Hindoo of any of the superior castes; an association, however involuntary, with persons of an inferior rank, or contaminated character, causing a forfeiture of caste, which, among the Hindoos, is productive of the same afflictions as excommunication at its first institution was intended to produce amongst Christians—extreme infamy, and an utter exclusion from all society but that of persons marked with the same stigma. It has been said, I hope without truth, that by some unhappy neglect, when the Rajah Nuncomar, a man of the first rank in Bengal, was in custody for the forgery for which he was afterwards tried under the laws of Great Britain, and executed, proper care was not taken to protect him from this ideal contamination. If this be true, before he was proved guilty he was made to suffer a punishment greater perhaps than that to which he was afterwards sentenced.

† Howard, p. 39.

EVILS.

9.

Tumultuous noises—indecent practices—indelicate conversations.

10.

Evils resulting from the religious sanction—from the non-exercise of the ceremonies prescribed by it.

REMEDIES.

9.

Keepers to be directed to punish those guilty of such practices. The punishment to be made known to the prisoners by being fixed up in the prison.

10.

In Protestant countries, a chaplain to perform divine service. In Roman Catholic countries, a priest to perform mass, and to confess the prisoners, &c.*

CHAPTER V.

IMPRISONMENT—FEES.

Another way in which a man is often made to suffer on the occasion of imprisonment, is the being made to pay money under the name of fees. This hardship, on the very first inspection, when deduced as a consequence from a sentence or warrant of imprisonment, can be classed under no other title than that of an abuse; for naturally it has just as much to do with imprisonment as hanging has.

This abuse is coeval with the first barbarous rudiments of our ancient jurisprudence; when the magistrate had little more idea of the ends of justice than the freebooter; and the evils he inflicted were little more than a compensation for the evils he repressed. In those times of universal depravity, when the magistrate reaped almost as much profit from the plunder of those who were, or were pretended to be, guilty, as from the contributions of those who were acknowledged innocent, no pretext was too shallow to cover the enterprises of rapacity under the mask of justice.

All the colour which this abuse is capable of receiving, seems to have been taken from a quibbling and inhuman sarcasm: "Since you have lodging found you," says the gaoler to the prisoner, "it is fit, like other lodgers, you should pay for it." Fit it certainly would be, if the lodger came there voluntarily—the only circumstance in the case which is wanting to make it a just demand, instead of a cruel insult.

But the gaoler, like every other servant of the state, it will be said, and with perfect truth, must be satisfied for his trouble; and who more fit than the person who occasions it? I answer, any person whatever—if, contrary to the most obvious principles of justice, some one person must bear the whole charge of an institution, which if beneficial to any, is beneficial to all. I say anybody; because there is no person whose clear benefit from the punishment of the criminal (I am speaking here of the judicial, appointed punishment, the imprisonment; and I mean clear benefit after inconvenience has been deducted) is not greater than the criminal's. This would hold good, were the peculiar circumstances of the criminal out of the question; but when these come to be considered, they add considerable force to the above conclusion. In the case of nineteen delinquents out of twenty, the utter want of all means of satisfying their lawful debts was the very cause and motive to the crime. Now then, whereas it is only possible in the case of a man taken at random that he has not wherewithal to pay, it is certain that, in nineteen cases out of twenty, the delinquent has not.

So powerful is the force of custom, that, for a long series of years, judges of the first rank, and country magistrates, none of whom but would have taken it ill enough to have had their wisdom or their humanity called in question, stand upon record as having given their allowance to this abuse. If any one of these magistrates had ever had the spirit to have refused this allowance, the gaoler would for a moment have remained unpaid, and from thenceforward the burthen would have been taken up by that public hand which, from the beginning, ought to have borne it.†

So far is this hardship from being justifiable on the score of punishment, that in most, if not in all our prisons, it is inflicted indiscriminately on all who enter, innocent or guilty. It is inflicted at all events, when it is not known but they may be innocent; for it is inflicted on them at first entrance, when committed only for safe custody. This is not all: it is inflicted on men after they have been proved to be innocent. Even this is not all: to fill up the measure of oppression, it is inflicted on them *because* they have been proved innocent. Prisoners, after they have

* It was mentioned as a circumstance of peculiar distress attending the fate of many of the numerous state prisoners confined in Portugal during the Marquis of Pombal's administration, their being denarred, during a course of years, the comforts or confession. When this circumstance was brought to light, it produced a considerable degree of public indignation.

† By the old law, when money was recovered against a Hundred, the Sheriff laid hold of the first Hundredor he met, and made him pay the whole. Even this was a better expedient for providing for the public burthen than the one in question.

been acquitted, are, as if to make them amends for the unmerited sufferings they have undergone, loaded with a heavy fine, professedly on the very ground of their having been acquitted. In some gaols, of a person acquitted of murder a sum of money is exacted, under the name of an acquittal, equal to what it costs an ordinary working man to maintain himself for a quarter of a year: a sum such as not one man in ten of that class, that is, of the class which includes a great majority of the whole people, is ever master of during the course of his whole life.

CHAPTER VI.

IMPRISONMENT EXAMINED.

WE now proceed to examine the degree in which imprisonment possesses the several properties desirable in a lot of punishment.

1. Imprisonment possesses the property of *efficacy with respect to disablement* in great perfection. The most dangerous offender, so long as his confinement continues, is deprived of the power of doing mischief out of doors; his vicious propensities may continue at their highest pitch, but he will have no opportunity of exercising them.

2. Imprisonment is generally exceptionable on the score of frugality; none of the inconveniences resulting from it being convertible to profit. It is also generally accompanied with expense, on account of the maintenance of the persons confined. In these calculations of expense, that loss ought not to be forgotten which results from the suspension of the lucrative labours of the prisoner, a loss which is often continued beyond the period of his imprisonment, owing to the habits of idleness it has induced.*

3. Imprisonment is objectionable in respect of equality. If we recur to the catalogue of privations of which it consists, it will be seen that the inequality is extreme, when one prisoner is sickly, and the other healthy; when one is the father of a family, and the other has no relations; when the one is rich, and accustomed to all the enjoyments of society, and the other poor, and his usual condition is one of misery.

One party may be deprived of his means of subsistence; another may be scarcely affected in this respect. It may be said, is not this loss merely temporary? may it not be considered as a forfeiture which forms a part of the punishment? If the individual belong to a profession, the exercise of which cannot be interrupted without great risk of its total loss, the consequence may be his absolute ruin. This is one of those cases in which a latitude may properly be left to the judge, of commuting this punishment for another. A pecuniary punishment may frequently, with propriety, be substituted. The greater number of offenders, however, are not in a condition to furnish this equivalent. It would therefore be necessary to have recourse to simply afflictive punishments. The degree of infamy attached to these punishments would, however, not be an objection in case the offender consented to the exchange; and this consent might be made a necessary condition.

Among the inconveniences which may be attached to imprisonment, there is one which is particularly inequable. Take away paper and ink from an author by profession, and you take away his means of amusement and support: you would punish other individuals, more or less, according as a written correspondence happened to be more or less necessary for their business or pleasure. A privation so heavy for those whom it affects, and at the same time so trifling for the greater number of individuals, ought not to be admitted in quality of a punishment. Why should an individual, who has received instruction in writing, be punished more than another. This circumstance ought rather to be a reason for indulgence: his sensibility has been augmented by education; and the instructed and cultivated man will suffer more from imprisonment than the ignorant and the clownish.

On the other hand, though the punishment of imprisonment is inequable, it should be observed, that it naturally produces an effect upon every one. There is no individual insensible to the privation of liberty — to the interruption of all his habits, and especially of all his social habits.

4. Imprisonment is eminently *divisible*, with respect to its duration. It is also very susceptible of different degrees of severity.

5. Under the present system, the exemplarity of imprisonment is reduced to the lowest term. In the Panopticon, the facility afforded to the admission of the public, adds much to this branch of its utility.

However, if the prisoners are not seen, the prison is visible. The appearance of this habitation of penitence may strike the imagination, and awaken a salutary terror. Buildings employed for this purpose ought therefore to have a character of seclusion and restraint, which should take away all hope of escape, and should say, "This is the dwelling-place of crime."

6. *Simplicity of Description.* — Under this head there is nothing to be desired. This punishment is intelligible to all ages, and all capacities. Confinement is an evil of which every body can form an idea, and which all

* This objection to imprisonment is carefully removed in the plan of Panopticon Imprisonment, an account of which is given in Book V. ch. 3.

have, more or less, experienced. The name of a prison at once recalls the ideas of suffering as connected with it.

Let us here stop to examine three auxiliary punishments, that under special circumstances, and for a limited time only, may be usefully made to accompany afflictive imprisonment. These auxiliaries are *solitude*, *darkness*, and *hard diet*. Their distinguishing merit consists in their *subserviency to reformation*.

That the three hardships, thus named, have a peculiar tendency to dispose an offender to penitence, seems to be the general persuasion of mankind. The fact seems to be pretty generally acknowledged; but the reasons are not altogether obvious, nor do they seem to be very explicitly developed in the minds of those who show themselves strenuously convinced of the fact. An imperfect theory might naturally enough induce one to deny it. "What is it," it may be said, "that is to produce in the offender that aversion to his offence which is styled penitence? It is the pain which he experiences to be connected with it. The greater, then, that pain, the greater will be his aversion; but of what kind the pain be, or from what source it issues, are circumstances that make no difference. Solitude, darkness, and hard diet, in virtue of a certain quantity of pain thus produced, will produce a certain degree of aversion to the offence: be it so. But whipping, or any other mode of punishment that produced a greater pain, would produce a stronger aversion. Now, the pain of whipping may be carried to as high a pitch as the pain produced by this group of hardships altogether. In what respect, then, can these have a greater tendency to produce penitence, than whipping?"

The answer is, that the aversion to the offence depends, not merely upon the magnitude of the pain that is made to stand connected with it; but it depends likewise upon the strength of the connexion which is made to take place between those two incidents in the patient's mind. Now, that solitude, darkness, and hard diet, have a greater tendency than any other kind of hardship to strengthen this connexion, I think, may be satisfactorily made out.

Acute punishment, such as whipping, at the time it is inflicted, leaves no leisure for reflection. The present sensation, with the circumstances that accompany it, is such as engrosses the whole attention. If any mental emotion mix itself with the bodily sensation, it will rather be that of resentment against the executioner, the judge, the prosecutor, or any person whose share in the production of the suffering happens to strike the sufferer most, than any other. The anguish is soon over; and as soon as it is over, the mind of the patient is occupied in the eager pursuit of objects that shall obliterate the recollection of the pain that he has endured; while all the objects by which he is surrounded contribute to repel those salutary reflections upon which his reformation depends. Indeed, as soon as the anguish is over, a new emotion presents itself—an emotion of joy which the patient feels at the reflection that his suffering is over.

The gradual and protracted scene of suffering produced by the combination of punishments we are now considering, is much more favourable to the establishment of the wished-for effect. By solitude, a man is abstracted from those emotions of friendship or enmity which society inspires; from the ideas of the objects their conversation is apt to bring to view; from the apprehension of the disagreeable situations their activity threatens to expose him to, or the pleasures in which they solicit him to engage. By confinement, he is abstracted from all external impressions but such as can be afforded him by the few and uninviting objects that constitute the boundaries, or compose the furniture of a chamber in a prison; and from all ideas which, by virtue of the principle of association, any other impressions are calculated to suggest.

By darkness, the number of the impressions he is open to is still further reduced, by the striking off all those which even the few objects in question are calculated to produce upon the sense of sight. The mind of the patient is, by this means, reduced, as it were, to a gloomy void; leaving him destitute of all support but from his own internal resources, and producing the most lively impression of his own weakness.

In this void, the punishment of hard diet comes and implants the slow but incessant and corroding pain of hunger; while the debility that attends the first stages of it (for the phrensy that is apt to accompany the last stages is to be always guarded against,) banishes any propensity which the patient might have left, to try such few means of activity as he is left undeprived of, to furnish himself with any of the few impressions he is still open to receive. Meantime, that pain and this debility, however irksome, are by no means so acute as to occupy his mind entirely, and prevent altogether its wandering in search of other ideas. On the contrary, he will be forcibly solicited to pay attention to any ideas which, in that extreme vacancy of employment, are disposed to present themselves to his view.

The most natural of all will be to retrace the events of his past life; the bad advice he received; his first deviations from rectitude, which have led to the commission of the offence for which he is at the time undergoing punishment—a crime, all the pleasures derived from which have been already reaped,

and of which all that remains is the melancholy suffering that he endures. He will recall to his recollection those days of innocence and security which were formerly his lot, and which, contrasted with his present wretchedness, will present themselves to his imagination with an increased and factitious degree of splendour. His penitent reflections will naturally be directed to the errors of which he has been guilty: if he have a wife, or children, or near relations, the affection that he once entertained for them may be renewed by the recollection of the misery that he has occasioned them.

Another advantage attendant on this situation is, that it is peculiarly fitted to dispose a man to listen with attention and humility to the admonitions and exhortations of religion. Left in this state of destitution in respect of all external pleasures, religious instructions are calculated to take the stronger hold of his mind. Oppressed by the state of wretchedness in which he finds himself, and by the unlooked-for or unknown events that have led to the detection of his crime, the more he reflects upon them, the more firmly will he be convinced of the existence of a providence which has watched over his actions, and defeated his best concerted contrivances. The same God that punishes him, may also save him; and thenceforward the promises of eternal bliss or torment will more anxiously engage his attention — promises of happiness in another state of being, in case of repentance, and denunciations of torments prepared for the guilty in the regions of eternal night, of which his present situation seems a prelude and a foretaste, will fix his regard. In a frame of mind such as this, to turn a deaf ear to the admonitions and consolations afforded by religion, a man must be very different from the ordinary caste of men. Darkness, too, has, in circumstances like this, a peculiar tendency to dispose men to conceive, and in a manner to feel, the presence of invisible agents. Whatever may be the reason, the fact is notorious and undisputed. When the external senses are restrained from action, the imagination is more active, and produces a numerous race of ideal beings. In a state of solitude, infantine superstitions, ghosts, and spectres, recur to the imagination. This, of itself, forms a sufficient reason for not prolonging this species of punishment, which may overthrow the powers of the mind, and produce incurable melancholy. The first impressions will, however, always be beneficial.

If, at such a time, a minister of religion, qualified to avail himself of these impressions, be introduced to the offender thus humiliated and cast down, the success of his endeavours will be almost certain, because in this state of abandonment he will appear as the friend of the unfortunate, and as his peculiar benefactor.

This course of punishment, thus consisting of solitude, darkness, and hard diet, is, as has been observed, when embodied, a sort of discipline too violent to be employed, except for short periods: if greatly prolonged, it would scarcely fail of producing madness, despair, or more commonly a stupid apathy. This is not, however, the place for fixing the duration of the punishment proper for each species of offence: it ought to vary according to the nature of the offence, the degree of obstinacy evinced by the offender, and the symptoms of repentance which he exhibits. What has been already said, is sufficient to show that the mass of punishments in question may be employed with the greatest advantage simultaneously: they mutually aid each other. In order to produce the desired effect most speedily, even the sort of food allowed may be rendered unpalatable as well as scanty, otherwise there would be danger lest to a young and robust person the constantly recurring gratification afforded to the palate, might render him insensible to the loss of all other pleasures.

If any punishment can in itself be popular, this, I think, promises to be so. It bears a stronger resemblance than any other to domestic discipline. The tendency which it has to lead the offender to acknowledge the evil of his offence and the justice of his sentence, is the same which an indulgent father desires his punishments to possess, when he inflicts them upon his children; and there is no aspect which it is more desirable the law should assume than this.

The effects produced by solitary confinement are not matters of mere conjecture: they have been ascertained by experience, and are reported upon the best authorities.

Speaking of the cells in Newgate, "I was told," says Mr. Howard,* "by those who attended me, that criminals who had affected an air of boldness on their trial, and appeared quite unconcerned at the pronouncing sentence upon them, were struck with horror, and shed tears, when brought to these darksome, solitary abodes."

"I remember an instance," says Mr. Hanway,† "some years before the law for proceeding to sentence upon evidence, of a notorious malefactor, who would not plead. It was a question, whether he should be brought to the *press*; but the jailor privately recommended to the magistrates to try solitary confinement in prison. This produced the effect, for in less than twenty-four hours, the daring, artful felon chose to hold up his hand at the bar, and quietly submit to the laws, rather than remain in such a solitary state without hope."

* Page 152. † Page 75.

The same gentleman mentions* a set of cells, provided for the purpose of solitary confinement, in Clerkenwell Bridewell, by order of the Justices of the Peace for that division. One of those magistrates, he says, assured him, "That every person committed to those solitary apartments had been in a few days reformed to an amazing degree." The apartments, though solitary, were not dark, nor is any thing said about the circumstance of diet.

Directly opposed to solitary imprisonment is the promiscuous association of prisoners. The suffering which results from this circumstance, is not the result of direct intention on the part of the magistrate. It is an evil acknowledged, and yet suffered still to exist to a very considerable extent. It is evidently not so much inflicted, as admitted, from the supposed inability of government to exclude it; the great and only objection to its exclusion being the expense of the arrangement necessary to the accomplishment of that purpose. The advantage by which it is recommended, is that of frugality; it is less expensive to shut up prisoners in one room, than to provide separate apartments for each one, or even to keep them divided into classes.†

This promiscuous assemblage of prisoners, considered as part of the punishment, has no penal effect upon the most audacious and the most perverse. On the contrary, with reference to them, it renders imprisonment less painful: the tumult with which it surrounds them, diverts them from the misery of their situation, and from the reproaches of their consciences. It is therefore an evil most severe for the prisoner of refinement and sensibility. It is an addition to the punishment of imprisonment, evidently unequable, unexemplary, and unprofitable, producing a variety of unknown sufferings, such that those only who have experienced them can be fully acquainted with their extent.

But the great and decisive objection to the promiscuous association of prisoners, considered as a punishment, is, that it is directly opposed to their reformation. Instead of rendering a delinquent better, its evident tendency is to make him worse. The ill effect which, in the instance of indelible infamy, is only problematical, is, in the instance of this species of hardship, certain; it obliterates the sense of shame in the mind of the sufferer; in other words, it produces insensibility to the force of the moral sanction.

This ill effect of the promiscuous association of prisoners is too obvious not to strike even the most superficial spectator. Criminals, confined together, are corrupted, it is said, by the society of each other: there are a thousand ways of diversifying the expression, and it is generally set off with great exuberance of metaphor. The word *corruption*, and the greater part of the terms that compose the moral vocabulary, are not calculated, of themselves, to convey any precise import, but serve rather to express the disapprobation which he who uses them happens to entertain of the practices in question, than the tendency to produce mischief, which is, or at least ought to be, the ground of it. In order, then, to form a precise idea of the phenomena in which this corruption displays itself, let us examine the mischievous habits produced by this promiscuous intercourse, and the way in which it tends to produce mischief in society.

The ill consequences of the association in question, may be comprised under the following heads: —

1. It strengthens, in the minds of all parties concerned, the motives which prompt to the commission of all sorts of crimes.

2. It diminishes the force of the considerations which tend to restrain them.

3. It increases their *skill*, and by that means the *power*, of carrying their obnoxious propensities into practice.

Crimes are the sort of acts here in question. Now, the names of crimes are words, for which precise ideas have, or might at least be found: they are evils of a certain description. The names of the motives that prompt a man to the commission of a crime, are also the names of pains and pleasures. In examining, therefore, the consequences of the association of delinquents, under the foregoing heads, we tread upon clear and palpable ground, unobscured by metaphor and declamation.

1. As to the motives by which men are prompted to the commission of crimes: These are the expectation of the pleasures which are the fruit of them. By far the greater number of the offences which bring men to a prison, are the offspring of *rapacity*. Crimes issuing from any other motive are so few as scarcely to demand in this view any separate notice. The bulk of offenders will be of the poorer sort; among them, the produce of a little plunder will go in the purchase of pleasure much beyond that which the ordinary produce of their labour would enable them to purchase; such as more food, more delicate liquors, in greater plenty and more delicious, — finer clothes, and more expensive pleasures. These things naturally form the subject of conversation among the prisoners, and an inexhaustible subject of boasting on the part of those who by their skill or good fortune have acquired the means of enjoying them. These recitals give a sort of superiority which those who possess it are fond,

* Page 74.

† It must be acknowleged that this difficulty was very great before the invention of the plan of central inspection.

from a principle of vanity, to display and magnify to the humble and admiring crowd of their less fortunate associates. They inflame the imagination of the hearers; and, in a word, their propensity to gratify their rapacity by all sorts of crimes, is increased by the prospect of the pleasures of which the means are furnished by these crimes. The more numerous the association, the more varied the exploits to be recounted; and what subject more naturally the subject of conversation, than the circumstances which have brought them together?

2. While, on the one hand, as has been just observed, all the vicious propensities are nourished and invigorated, — on the other hand, all considerations tending to restrain the commission of offences are repelled and enfeebled. These considerations belong to the one or the other of the three sanctions — the political, the moral, or the religious.

Those derived from the *political sanction* are the various punishments appointed by law: amongst these, that which they are actually undergoing, have undergone, or are about to undergo. Of these sufferings it will naturally be the study of them all to make as light as possible; to which end, the society of each other will afford them many powerful assistances. From pride, each man will endeavour to make his own sense of his own sufferings appear to others as slight as possible: he will undervalue the afflicting circumstances of his situation; he will magnify any little comforts which may attend it, and, as the common phrase is, will put as good a face upon the matter as he can. Thus the most intrepid and proud becomes a patron for all the others. The sensibilities of all are gradually elevated to the same pitch: it would be matter of shame to them not to bear their misfortunes with equanimity. Even from mere sympathy, many will derive a powerful motive to soothe the sufferings of their partners in affliction — to congratulate them on the termination of such as are past, to relieve them under such as are present, and to fortify them against such as may be to come. It may possibly be observed, that to ascribe to persons of the class in question any such benevolent affections, is to attribute to them virtues to which they are altogether strangers. But to suppose that men consist only of two classes, the altogether good, and the altogether bad, is a vulgar prejudice. The crime which subjects a man to the lash of the law may leave him possessed of a thousand good qualities, and more especially of sympathy for the misfortunes of others. Daily experience may convince us of this, and lead us to believe that the criminal are not always altogether vicious.

The considerations derived from the *moral sanction* are the various evils, positive and negative, apprehended from the ill-will of such persons with whom the person in question is in society. Whilst a man remains in general society, though his character may be the subject of general suspicion, he will be obliged to keep a guard upon his actions, that he may not too strongly confirm these suspicions and render himself altogether despicable. But in a prison the society is unmixed, having interests of its own, opposite to the former, governed by habits and principles opposite to those which are approved in general society. The habits and practices which were odious there, because they were mischievous there, — not being mischievous, are not odious here. Theft is not odious among thieves, who have nothing to be stolen. It is in vain for them to make pretensions to probity; they agree, therefore, by a tacit convention, to undervalue this virtue. The mixed qualities of patience, intrepidity, activity, ingenuity, and fidelity, which are beneficial or not according as they are subservient to the other, will be magnified, to the prejudice of the former. A man will be applauded for his patience, though it were exerted in lying in wait for a booty; for his intrepidity, though manifested in attacking the dwelling of a peaceable householder, or in defending himself against the ministers of justice; for his activity, though employed in seizing the unwary traveller; for his ingenuity, though displayed in working upon the sympathetic feelings of some deluded, compassionate benefactor; for his fidelity, though employed in screening his associates in some enterprise of mischief from the pursuit of the injured. These are qualities which enjoy the highest estimation in such society; and by their possession, that thirst for sympathy and applause is gratified, of which every man, in whatever situation he is placed, is desirous.

The probity which is held in honour, in such society, is not intended to be useful to mankind at large: its rules may be strictly observed in the society in which it is established, and disregarded to the prejudice of all persons not connected with that society. The Arabs, who live by plunder, are remarkable for their honesty towards the members of their own tribe. Thus also, that there is *honour among thieves*, has become proverbial.*

* The influence of a man's conduct on the happiness of the whole race of sensitive beings, must be taken into the account, before it can with propriety be termed virtuous or vicious, simply and without addition. The same conduct which is pernicious, and on that account is or ought to be disreputable in society at large, is beneficial to, and on that account held in honour by, a smaller society included within the former. The member of parliament who solicits or defends for his borough a privilege detrimental to

The considerations derived from the *religious sanction*, are the sufferings apprehended from the immediate will of the Deity, in some degree perhaps in the present, but chiefly in a future life. This displeasure is, under the Christian religion, and particularly the Protestant, invariably believed to be annexed, with few or no exceptions, to all those malpractices which bring men into prisons. The considerations, therefore, which that sanction affords, are to be numbered among the considerations which tend to restrain men from committing crimes. Now the force of this sanction, acting in opposition to that of the local moral sanction, which is generated and governs in a prison, will naturally have the whole force of this latter exerted against it to overthrow it. Not that a prison is the region of acute and scrupulous philosophy: the arguments there made use of, will be addressed to the passions, rather than the judgment. The being of a God, the authority of Revelation, will not be combated by reason. The force of this sanction will be eluded rather than opposed; the attention will be diverted from the idea of God's displeasure, to the improbability of its being manifested. The authority of revelation will be combated by satires upon its ministers; and that man will be pronounced brave, who shall dare to deny the one, and despise the other. And arguments of this kind will be found to have most influence upon the members of such societies.

3. The third and last of the ways in which the association of malefactors in prisons contributes to corrupt them, is by increasing their skill, and by that means their power of carrying their mischievous propensities, whatever they may be, into practice.

That their conversation will naturally turn upon their criminal exploits, has been already observed. Each malefactor will naturally give a detail of the several feats of ingenuity which, in the course of those exploits, the occasion led him to practise. These facts will naturally be noted down, were it only on the score of curiosity. But as means of gratifying those propensities, which the situation in question has a strong tendency to strengthen and confirm, they will make a much more forcible impression. An ample mass of observations will be soon collected, drawn from the experience of the whole society, and each particular member of it will soon be wise with the wisdom of the whole. Prisons, therefore, have commonly and very properly been styled *schools of vice*. In these schools, however, the scholar has more powerful motives for, and more effectual means of, acquiring the sort of knowledge that is to be learnt there, than he has of acquiring the sort of knowledge that is taught in more professed schools. In the professed school, he is stimulated only by fear; he strives against his inclination: in these schools of vice, he is stimulated by hope, acting in concert with his natural inclination. In the first, the knowledge imparted is dispensed only by one person; the stock of knowledge proceeds from one person: in the others, each one contributes to the instruction of all the others. The stock of knowledge is the united contribution of all. In professed schools, the scholar has amusements more inviting to him than the professed occupations of the school: in these, he has no such amusements; the occupation in question is the chief of the few pleasures of which his situation admits.

To the most corrupt, this promiscuous association is mischievous. To those committed for a first offence, who have yielded to the temptations of indigence, or have been misled by evil example; who are yet young, and not hacknied in crimes; punishment, properly applied, might work reformation. This association can only render such more vicious; they will pass from pilfering to greater thefts, till they are guilty of highway robbery and murder. Such is the education yielded by promiscuous association of criminals in prison.

the nation, is called a patriot in his borough. The man who devised the oath by which the candidates for degrees were to engage not to propagate, elsewhere than at Oxford and Cambridge, the seeds of what was thought useful learning, was probably thought a man of great merit in those Universities.

CHAPTER VII.

GENERAL SCHEME OF IMPRISONMENT.

Let there be three kinds of imprisonment, differing one from another in the degree of their severity.

The first for insolvents: in case of rashness or extravagance, in lieu of satisfaction. The second for malefactors whose imprisonment is to be temporary: these may be styled second-rate malefactors. The third for malefactors whose imprisonment is perpetual: These may be styled first-rate malefactors.

1*st*. Let all insolvents be upon the footing of bankrupts; compellable to discover, under pain of death, or other heavy penalty; on discovery not liable to imprisonment of course, but liable in case of rashness or extravagance: or else let rashness or extravagance be presumed in the first instance; and let it lie upon the insolvent to exculpate himself. To the same prison let such persons be committed as are arrested upon *mesne* process. On persons of this class, the imprisonment comes in before judgment, to enforce—after judgment, to stand in lieu of satisfaction. Here let there be no mark of infamy; nor let there be here any rigour, either real or apparent.

The second kind of imprisonment is designed for correction as well as for example. The real, therefore, and the apparent punishment, ought to be upon a par. Here let labour be added to imprisonment, and for the last week, or fortnight, or month, solitude, darkness, and spare diet. Here let a stigma be inflicted; but let that stigma be a temporary one. It will answer two purposes: first, that of example, as increasing the apparent punishment; second, that of security, by preventing escape.

The third kind of imprisonment is destined for example only. The end of correction is precluded; since the delinquent is never to mix with society again. Here, too, for the same purposes as in the former case, let a stigma be inflicted; and let that stigma be perpetual. Here let the apparent condition of the delinquent be as miserable, and the real as comfortable, as may be. Let the gentleman occupy himself as he pleases: let the yeoman, who has an art, exercise his art, and let him be a sharer in the profits. Let the labour of the yeoman who knows no art be more moderate than in the temporary prison.

The diet in many prisons is in part provided for by private benefactions. Such benefactions are of use only upon supposition of that gross negligence on the part of government, of which they are a pregnant testimony. The demand a man in the situation in question has for food, is not at all varied by the happening or not happening of a casual act of humanity by a chance individual. Whatever be the proper allowance, he ought to have as much, although no private benefaction were given for that purpose; he ought not to have more, were the amount of such benefactions ever so considerable. If ever the legislature should fulfil this obvious and necessary duty, all such private benefactions should be taken into the hands of the public. Such resumption, far from being a violation of the wills of the benefactors, would be a more complete execution of them than any they could have hoped for.

For the same reason, all casual benefactions of particular persons, to particular delinquents, should be prevented. The way to do this is not to prevent the money's being given, but to prevent its being spent, at least in food and liquors: the introduction of money could not be prevented, without establishing a search too troublesome and humiliating to be executed with the strictness requisite to answer the purpose; but articles so bulky as those of food and liquors might easily be excluded. Such an institute would tend in no inconsiderable degree to promote restitution. At present, in all offences of rapacity, that is, in nineteen out of twenty of the crimes that are committed,* the greater a man's guilt has been — the more mischief he has done, the better he fares while he is in prison. It is seldom that the whole produce of the crime is found upon the delinquent at the time of his being apprehended; and though it be found on him, if it consist in money, it is seldom that it can be identified in such manner as to warrant the restitution of it against the consent of the delinquent. Commonly, if it be not spent, it is in the hands of some friend of the delinquent; an associate in iniquity, a wife or mistress. Thus secured, it is disposed of at his direction, and either lavished in debauchery, or in feeing lawyers to obstruct the course of justice.

When, therefore, the plunder is of no use to him, it will require a much less effort on his part, to restore it to the right owner. The workings of conscience will be powerfully seconded by such an institution.

Whatever, therefore, is found upon the person, or in the possession of any one who, by virtue of a charge upon oath, is apprehended for a felony, should be impounded in the hands of the officer. As much of it as consists in money, or other articles that include a considerable value in a small compass, should be sealed up with the seal of the magistrate; who should have it in his option to keep it in his own custody, or commit it to that of the ministerial officer, giving, in either case, a receipt to the suspected felon.

An objection to imprisonment, when all are upon an equal footing with respect to entertainment, is, that the punishment is apt to be disproportionate. The rich are punished more than the poor; or, in other words, those who have been accustomed to good living, more than those who have been accustomed to hard living. On the other hand, to allow those who are committed for crimes of rapacity to give in to any expense, while any part of the booty they may have made remains unrestored, is to allow them to enjoy the profit of their crimes; to give the criminal an indulgence at the expense of those whom he has injured.

Here, then, arises a difference in the treatment proper to be given in this respect to different crimes. Persons committed for crimes of rapacity should, in the case where the profit of the crime has been reaped, be debarred, until complete restitution shall have been made, of the liberty of procuring themselves those indulgences that are to be had for money. Persons committed for any other crimes may be allowed it.

With respect to restitution, a further caution is to be observed. It will happen very frequently, that a person apprehended for one offence has been guilty of many others. For this reason, it is not the restitution of the booty gained by the first offence for which

* See Howard's Tables.

the malefactor is apprehended, that ought to be deemed sufficient to entitle him to the liberty of purchasing indulgences. A time ought to be limited (suppose a month or six weeks,) and notice given for any persons who, within a certain time (suppose a year,) have been sufferers by him, to come in and oppose the allowance of such liberty. Very light proof in such case ought to be held sufficient.

Let us return for a moment to the different kinds of prisons. The different purposes for which they are destined ought to be very decidedly marked in their external appearance, in their internal arrangements, and in their denomination.

The walls of the first sort ought to be white — of the second, grey — of the third, black.

On the outside of the two last kinds of prisons may be represented various figures, emblematical of the supposed dispositions of the persons confined in them. A monkey, a fox, and a tiger, representing mischief, cunning, and rapacity, the sources of all crimes, would certainly form more appropriate decorations for a prison than the two statues of melancholy and raving madness, formerly standing before Bedlam. In the interior, let two skeletons be placed, one on each side of an iron door: the occasional aspect of such objects is calculated to suggest to the imagination the most salutary terrors. A prison would thus represent the abode of death, and no youth that had once visited a place so decorated, could fail of receiving a most salutary and indelible impression. I am fully aware, that to the man of wit these emblematical figures may serve as matter for ridicule: he admires them in poetry; he despises them when embodied in reality. Fortunately, however, they are more assailable by ridicule than by reason.*

Distinguishing the several species of prisons by characteristic denominations, is far from being a useless idea. Justice and humanity to insolvent debtors, and to persons detained upon suspicion, require that they ought to be screened even from the apprehension of being confounded with delinquents, a risk to which they are naturally exposed, where all places of confinement bear the same appellation. If no such sentiment were found to be already in existence, the legislator ought to make it his business to create it: but the truth is, that it does exist, and it is the most valuable classes of the community that are most severely wounded by this want of discrimination.

A difference in the situation and name affords another means of aggravating one of the most important parts of the punishment — the apparent punishment.

The first sort of prison may be called the *House for Safe Custody* — the second, the *Penitentiary House* — the third, the *Black Prison*.

The first of these names does not convey any idea of misconduct; the second does, but at the same time presents the idea of reformation; the third is calculated to inspire terror and aversion.

With a view to reformation in the case of offences punished by temporary imprisonment, part of the punishment may consist in learning by heart a certain part of the criminal code, including that part which relates to the offence for which the party is punished. It might be digested into the form of a catechism.

In second-rate felonies and misdemeanors, where, after being punished, the offender is returned into society, it is of importance to lighten as much as possible the load of infamy he has been made to bear. The business is to render infamous, not the offender, but the offence. The punishment undergone, upon the presumption of his being reclaimed, he ought not, if he is returned into society, to have his reputation irretrievably destroyed. The business is, then, for the sake of general prevention, to render the offence infamous, and, at the same time, for the sake of reformation, to spare the shame of the offender as much as possible. These two purposes appear, at first, to be repugnant: how can they be reconciled? The difficulty, perhaps, is not so great as it at first appears. Let the offender, while produced for the purpose of punishment, be made to wear a mask, with such other contrivances upon occasion as may serve to conceal any peculiarities of person. This contrivance will have a farther good effect in point of exemplarity. Without adding anything to the force of the *real* punishment — on the contrary, serving even to diminish it, it promises to add considerably to the force of the *apparent*. The masks may be made more or less tragical, in proportion to the enormity of the crimes of those who wear them. The air of mystery which such a contrivance will throw over the scene, will contribute in a great degree to fix the attention, by the curiosity it will excite, and the terror it will inspire.

CHAPTER VIII.

OF OTHER SPECIES OF TERRITORIAL CONFINEMENT — QUASI IMPRISONMENT — RELEGATION — BANISHMENT.

Quasi Imprisonment consists in the confinement of an individual to the district in which his ordinary place of residence is situated.

* Of the importance of symbols, and the uses that have been made of them, by the Catholic clergy, after the example of ancient Rome, see *Emile*, tom iv.

Relegation consists in the banishment of an individual from the district in which his ordinary place of residence is situated, and his confinement to some other district of the state.

Banishment consists in the expulsion of a man from the country in which he has usually resided, and the prohibition of his return to it.

These three species of punishment may be either temporary or perpetual.

Relegation and banishment are punishments unknown to the English law. Transportation, as we shall presently have occasion to observe, is in its nature totally different. The exclusion of Papists from a certain district about the court is to be considered rather as a measure of precaution than of punishment.

It is true, that the condition of persons living within the rules of a prison corresponds pretty accurately with the idea of territorial confinement. But this kind of territorial confinement is not inflicted in a direct way as a punishment. The punishment inflicted by the law is that of imprisonment, which the prisoner is allowed to commute upon paying for it. A man is not committed to the rules: he is committed to the prison, and upon paying what the jailor chooses, or is permitted to demand, he has the liberty of the rules; that is, of being in any part of a certain district round about the jail.*

The several inhabitable districts which are privileged from arrest, may be considered as scenes of territorial confinement with respect to offenders, who resort to them to escape being arrested and sent to prison. A man in such cases voluntarily changes the severer species of restraint into a milder.

In France, instances of relegation were not unfrequent. Under the old regime, a man was ordered to confine himself to his estate, or to quit his estate and go and live at another place. A punishment, however, of this sort, almost always fell upon a man of rank, and generally was rather an arbitrary expression of the personal displeasure of the sovereign, than a regular punishment inflicted in the ordinary course of justice. The person on whom it fell was commonly a disgraced minister, or a member of parliament. It has repeatedly happened, that a whole parliament has been relegated for refusing to register a particular edict. In these cases, however, it was often employed, not so much as a punishment, as a means of prevention — to prevent what were called intrigues. The exercise of such an act of authority was a symptom of apprehension and weakness on the part of the minister.

When a man is banished from all the dominions of his own state, he has either the whole world besides left for him to range in, or he is confined to a particular part of it. In the first case, it may be said to be indefinite, with respect to the *locus ad quem;* in the other, definite.†

It might seem at first sight as if the defining the *locus ad quem* in banishment would be an operation nugatory and impracticable. For banishment is one of those punishments that are to be carried into effect, if at all, only by the terror of ulterior punishment. Now to be liable to ulterior punishment at the hands of his own state, a man must be still in the power of that state; which, by the supposition, it would appear as if he could not be. There are three cases, however, in which he may be so still: — 1. Where the banishment is only temporary; 2. Where, though his person is out of the dominions of his own state, his property, or some other possession of his, is still within its power; 3. Where the foreign state to which he is exiled is disposed on any account to cooperate with his own, and either to punish, or give up to punishment, such persons as the latter shall deem delinquents.

The inconveniences of territorial confinement, whether by relegation or banishment, are for the most part of the same description as those of simple imprisonment; they are apt in some respects to be greater, in others less severe than simple imprisonment.

Territorial confinement is, however, susceptible of such infinite diversity, arising from the nature of the place — the extent of the district — the circumstances of the delinquent — that nothing like uniformity can be met with,

* It appears from Mr. Howard, that in England there are six prisons that have *Rules* belonging to them. In London, two, the Fleet (p. 156,) and the King's Bench (p. 196:) in Carmarthen, two (pp. 422, 468;) one in the Cornish borough of Lostwithiel (p. 386;) and one in Newcastle-upon-Tyne (p. 422.)

† Instances of definite banishment are what one would not expect to find frequent in any system of legislation. In banishment, the object in general is to get rid of the malefactor; and what becomes of him afterwards is not minded. If it were an object of choice with the government, what country the delinquent should betake himself to, the circumstances that could not but serve to determine such a choice would naturally be such as were of a temporary nature. This, accordingly, was the case with an act of the British Parliament, which furnishes the only instance that occurs to me of a punishment of this nature. By statute 20 Geo. II. c. 46, the king is empowered to commute the punishment incurred by persons engaged in the late rebellion, into transportation to America; and the persons thus dealt with are made subject to the pains of capital felony, not only as usual in case of their returning to any part of Great Britain or Ireland, but besides that, in case of their going into any part of the dominions of France or Spain, nations with whom Britain was then at war.

and scarce any proposition can be laid down respecting it, that shall be generally true.

In case of relegation, the liberty of beholding the beauties of nature and of the arts, of enjoying the company of one's friends and relations, of serving them and advancing one's own fortune, is liable to be more or less abridged.

The liberty of exercising any public power, and of taking journies for the sake of health or of pleasure, are subject to be entirely taken away.

The liberty of carrying on business for a livelihood will be subject to be more or less abridged, according to its nature; and in respect of some particular species of business or trade, the opportunity of exercising it will be subject to be entirely taken away.

In respect to *banishment*, the inconveniences are liable to vary to such a degree, both in quality and species, that nothing can be predicated of this mode of punishment, that shall be applicable to all cases.

The sort of evils with which it will be found to be most generally accompanied, may be arranged under the following heads:—

Separation from one's friends, relations, and countrymen.

Loss of the liberty of enjoying objects of pleasure or of amusement to which one has been accustomed, as public diversions, or the beauties of nature or art.

Loss of the opportunity of advancement in the way of life in which one had engaged, as in the military line or in public offices.

Loss of the opportunity of advancing one's fortune, and derangement in one's affairs, whether of trade or any other lucrative profession. But under this head, scarce anything can with certainty be said, till the business of each delinquent is known, and the country to which he is relegated. All opportunity of advancing one's fortune may be totally taken away, or may be changed more or less for the worse; but it may even be improved. A workman acquainted with only one branch of a complicated manufacture, if relegated to a country in which no such manufacture was carried on, would lose the whole of his means of subsistence, so far as it depended upon that manufacture. A man engaged in his own country in the profession of the law, relegated to a country governed by different laws, would find his knowledge altogether useless. A clergyman of the church of England would lose the means of subsistence derivable from his profession, if relegated to a country in which there were no members of that sect to be found.

The quantity of suffering incident to banishment, and, in some cases, to relegation, will depend upon the individual's acquaintance, or want of acquaintance, with foreign languages. For this purpose it ought to be borne in mind, that in every country the great majority of the people know no other language than their own. A great deal will depend upon the language a man speaks. A German, or an Italian, merely by being banished his own state, would suffer nothing in this respect, because in other states he will find the bulk of the people speaking precisely the same language. Next to a German or an Italian, a Frenchman would be least exposed to suffer, on account of the popularity of the French language in other European nations. An Englishman (except in America,) a Swede, a Dane, and a Russian, would find themselves worse off in this respect than inhabitants of other European countries.

A man being among people with whose language he is unacquainted, is liable to be exposed to the most serious evils. A difficulty in conversation imports a difficulty in making known all one's wants; in taking the necessary steps for procuring all sorts of pleasures, of warding off all sorts of pains. Though so much of the rudiments of a language should be acquired as may be sufficient for the common purposes of life, a man rarely acquires it in such perfection as to enable him to enjoy, unembarrassed, the pleasure of conversation: he will feel himself condemned to a perpetual state of inferiority, which must necessarily interfere with, and obstruct his engaging in any profitable employment.

To some people, banishment may be rendered in the highest degree irksome by the manners and customs of the people among whom the individual is cast. The words, manners and customs, are here employed in their greatest latitude, and are considered as comprising every circumstance upon which a state of comfortable existence depends. The principal objects to which they refer are diet, clothing, lodging, diversions, and every thing depending on difference of government and religion; which last has, among the lower classes at least, no inconsiderable influence upon the sympathies and antipathies of persons in general.

Throughout Europe, especially among persons in the higher ranks of life, a certain degree of conformity in manners and customs prevails: but a Gentoo, banished from his own country, would be rendered extremely wretched, especially on the score of religion.

Change of climate is another circumstance of importance: the change may be for the better; but the bulk of mankind, from the effects of long habit, with difficulty accustom themselves to a climate different from that of their native country. The complaints of expatriated persons usually turn upon the injuries their health sustains from this cause.

With respect to all these several evils which are thus liable to arise out of the punishment

of banishment, no one of them is certain to have place; they may or may not exist; in respect of severity, they are liable to unlimited variation, and it may even happen that the good may preponderate over the evil.*

In point of frugality, it seems as if these several punishments were all of them more eligible than imprisonment, at least than the system of imprisonment as at present managed; and that quasi-imprisonment and relegation are more frugal than banishment.

Under imprisonment, a man must at all events be maintained. Simple imprisonment adds nothing to the facility which any man has of maintaining himself by his labour: it takes from that facility in many cases. By imprisonment, some people will always be altogether debarred from maintaining themselves. These must be maintained at the expense of the public. An imprisoned man, therefore, is, on an average, a burthen: his value to the state is negative. A man at liberty is, at an average, a profit: his value to the state is positive; for each man, at an average, must produce more than he consumes, else there would be no common stock. A banished man is neither a burthen nor a profit: his value to the state is 0; it is greater, therefore, than that of an imprisoned man.

The value of a man under quasi-imprisonment and relegation, may, it should seem, be taken as equivalent or not in any assignable degree, less than that of a man at large. In the only instances in which these modes of punishment occur in England, the sufferer, instead of receiving anything from the public, pays.†

In point of certainty, they have none of them anything to distinguish them from other punishments.

In point of equality, they are all of them deficient,‡ but especially the two latter, and most of all, the last.

To be confined to within the circuit of a small town, can scarcely but be a punishment in some degree to almost all, though to some more, to others less. To live out of one's own province, or out of one's own country, is a very severe punishment to many; but to many it is none at all.

It is impossible to state with any accuracy the difference in this respect between relegation and banishment. In one point of view, it should seem as if banishment were the more penal; for the difference in point of laws, language, climate, and customs, between one's own province, and another province of one's own state, is upon an average not likely to be so great as between one's own province and a foreign state. In nations, however, that have colonies, it will generally happen that there are provinces more dissimilar to one another upon the whole in those respects than some of those provinces may be to other provinces of neighbouring nations. How small a change, for instance, would an Englishman find in crossing from Dover to Dunkirk? and how great a change in going from the first of those places to the East or West Indies?

In point of variability, except in respect of time, no punishment of the chronical kind can be more ineligible than these. But in point of intensity, although the degrees of suffering they are liable to produce in different persons are so numerous, yet they are not by any means subject to the regulation of the magistrate. It is not in his power to fix the quantity of punishment upon the whole to anything near the mark he may pitch upon in his own mind.

In point of exemplarity, they all yield to every other mode of punishment, and banishment to the other two. As to banishment, what little exemplarity it possesses, it possesses upon the face of the description. The descriptions of orators and poets have rendered it in some degree formidable upon paper. On the score of execution, it is the essential character of it to have none at all. Removed out of the observation of his countrymen, his sufferings, were they ever so great, can afford no example to his countrymen. This is the lowest degree of inexemplarity a punishment can possess, when even the person of the sufferer is out of the reach of observation.

* Gallio having been exiled to the Isle of Lesbos, information was received at Rome that he was amusing himself there, apparently very much to his satisfaction; and that what had been imposed upon him as a punishment, had, in fact, proved to him a source of pleasure: upon this they determined to recal him to the society of his wife, and to his home, and directed him to confine himself to his house, in order that they might inflict upon him what he should think a punishment.—*Essais de Montaigne*, liv. i. c. 2.

So far the French writer: Tacitus says—

"Italiâ exactus: et quia incusabatur facile toleraturus exilium, delectâ Lesbo, insulâ nobili et amœna retrahitur in urbem, custoditurque domibus magistratuum."—*Ann.* lib. vi. c. 3.

† I am speaking of the rules in the six jails in England that have rules. The public is not at the expense of finding lodging. The houses are the property of private individuals, who get somewhat more for them than could be got for houses in the same condition out of the rules. Besides this advanced rent, the prisoner pays fees for the indulgence, which go towards the jailor's salary.

‡ This inequability may be illustrated by the history of the young Venetian noble relegated to the Isle of Candia. Despairing of being allowed to revisit the walls of his native city, and of again embracing his friends and his aged father, he committed another crime, unpardonable by the laws of the State, because he knew that he should be reconveyed to Venice for trial, and to suffer death.—Moore's *View of Society and Manners in Italy*, tom. i. lett. xiv.

The two others are upon a footing with pecuniary punishment; in which the person of the sufferer is under observation, and occasionally perhaps his sufferings; but there is no circumstance to point out the derivation of the latter from the punishment that produced them. They are inferior to imprisonment; because there the main instrument of punishment, the prison, is continually before his eyes. To quasi-imprisonment and relegation there belongs no such instrument—the punishment, as we have observed, being produced in the first instance not by any *material* but merely by *moral* means.*

On the score of subserviency to reformation, there seems to be a considerable difference among these three punishments. Quasi imprisonment is apt to be disserviceable in this view; relegation and banishment rather serviceable than otherwise, more especially the latter.

1. Quasi imprisonment is apt to be disserviceable. The reasons have been already given under the head of Imprisonment. The property which we mentioned as being incident to imprisonment, I mean of corrupting the morals of the prisoners by the accumulating, if one may so say, of the peccant matter, is incident to quasi imprisonment only in a somewhat less degree. Under the former, they can have no other company than that of each other: under the latter, there may be room for some admixture of persons of repute. Under the former, they are forced into the company of each other: under the latter, they may choose to be alone.

2. Relegation is apt to be rather serviceable than otherwise: as in solitary imprisonment, if the delinquent has formed any profligate connexions, it separates him from them, and does not, like simple imprisonment, lead him to form new ones of the same stamp. Turned adrift among strangers, he cannot expect all at once to meet with a set of companions prepared to join with him in any scheme of wickedness. Should he make advances and be repulsed, he exposes himself to their honest indignation, perhaps to the censure of the law. Should the company he happens to fall in with be persons as profligate as himself, it would be some time before he could establish himself sufficiently in their confidence. If he continue to make war upon mankind, it must be with his own single strength. He may find it easier to betake himself to charity or to honest labour. He is separated not only from the objects which used to supply him with the *means* to commit crimes, but from those which used to furnish him with the *motives*. The company he meets with in the new scene he enters upon, will either be honest, or at least, for aught he can know to the contrary, will for some time seem to be so. In the meantime, the disapprobation he may hear them express for habits resembling those which subjected him to the punishment he is undergoing, may co-operate with that punishment, and contribute to the exciting in him that salutary aversion to those habits which is styled repentance.

3. In this respect, banishment is apt to be rather more serviceable than relegation. If the delinquent be still of that age at which new habits of life are easily acquired, and is not insensible to the advantages of a good reputation, his exile, if the character in which he appears is not known, will be the more likely to contribute to his reformation, from his finding himself at a distance from those who were witnesses of his infamy, and in a country in which his endeavours to obtain an honest livelihood, will not be liable to be obstructed by finding himself an object of general suspicion. But even though he were to carry with him to the place of his banishment his original vicious propensities, he would not find the same facilities for giving effect to them, especially if the language of the country were different from his own. The laws also of the foreign country being new to him, may on that account strike him with greater terror than the laws of his own country, which he had perhaps been accustomed to evade. And even in case of meeting with success in any scheme of plunder, the want of established connexions for the disposing of it would render the benefit derivable from it extremely precarious. The consideration of all these difficulties would tend to induce him to resort to honest labour as the only sure means of obtaining a livelihood.

But, taking all the above sources of uncertainty into consideration, it will be found that the cases are very few in which banishment can be resorted to as an eligible mode of punishment. In what are called state offences, it may occasionally be employed with advantage, in order to separate the delinquent from his connexions, and to remove him from the scene of his factious intrigues. In this case, however, it would be well to leave him the hope of returning, as a stimulus to good conduct during his banishment.

CHAPTER IX.

OF SIMPLY RESTRICTIVE PUNISHMENTS.

Having now considered the several punishments which restrain the faculty of locomotion, we proceed to the consideration of those

* The little benefit that banishment, in so far as it operates as a punishment, can be of in the way of example, is reaped by foreign states; by that state, to wit, which the banished man chooses for his asylum.

which restrain the choice of occupations. These may be called simply restrictive punishments, and consist in a simple prohibition of performing certain acts.

Upon this occasion we may recur to a distinction already explained, which exists between restraint and punishment. The Civil Code and Police Code are full of restraints which are not punishments. Certain individuals are prohibited from selling poison. Innkeepers are prohibited from keeping their houses open after a certain hour. Persons are prohibited from exercising the professions of medicine or of the law, without having passed through certain examinations.

Simply restrictive punishments consist in the preventing an individual from enjoying a common right, or a right which he possessed before. If the prohibition respect a lucrative occupation; if, for example, an innkeeper or a hackney-coachman be deprived of his license, the prohibition acts as a pecuniary punishment, in its nature very inequable and unfrugal. If a man be deprived of the means of earning his subsistence, he must still be supported; the punishment therefore falls not upon the individual alone, but upon others whom it was not intended to affect.

Employments which are not lucrative may be of an agreeable nature. Their variety is infinite; but there is one point in which they all agree, and which will render it unnecessary to submit them to a detailed discussion. There are none of them, or at least scarcely one, which by its deprivation furnishes a sufficient portion of evil to enable us to rely upon its effect.

As respects pleasures, the mind of man possesses a happy flexibility. One source of amusement being cut off, it endeavours to open up another, and always succeeds: a new habit is easily formed; the taste adapts itself to new habits, and suits itself to a great variety of situations. This ductility of mind, this aptitude to accommodate itself to circumstances as they change, varies much in different individuals; and it is impossible beforehand to judge, or even to guess, how long an old habit will retain its dominion, so that its privation shall continue a real punishment.

This is not the only objection. Restrictive laws are very difficult of execution; they always require a subsidiary punishment, of which the effect is uncertain. If you prohibit an individual from gaming, drunkenness, dancing, and music, it becomes necessary to appoint an inspector for all these things, in all places, to see that your prohibition is observed. In a word, punishments of this kind are subject to this dilemma: either the attachment to the object prohibited is very weak or very strong: if strong, the prohibition will be eluded; if weak, the object desired will not be obtained.

In respect of exemplarity, they are equally defective: the privations they occasion are not of a nature to be generally known, or if known, to produce a strong effect upon the imagination; the misery they produce rankles in the mind, but is completely hidden from the public eye.

These are some of the circumstances which have reduced the employment of these punishments within so narrow a compass: they are too uncertain in their effects, and too easily eluded, to allow of their use, as the sanction to a general law. It is true, that if judges were acquainted with the characters and circumstances of individuals, they might avail themselves of them with good effect; but this knowledge can scarcely ever be expected.

This species of punishment is well suited to domestic government. There is no pleasure which a parent or teacher cannot employ as a reward, by permitting its enjoyment, or convert into a source of punishment, by restricting its use.

But though restraints of this nature, that is to say, prohibition of agreeable occupation, do not alone form effective punishments, there is one case in which they may be usefully employed in addition to some other punishment: analogy recommends such employment of them. Has an offence been committed at some public exhibition, it may be well to prohibit the delinquent from attending such public exhibitions for a time.

Among simply restrictive punishments, there is one of which a few examples are found, and which has not received a name: I have called it *banishment from the presence*. It consists in an obligation imposed upon the offender immediately to leave the place in which he meets with the offended party. The simple presence of the one is a signal for the departure of the other. If Silus, the party injured, enter a ball or concert room, a public assembly or public walk, Titius is bound instantly to leave the same. This punishment appears admirably well suited for cases of personal insult, attacks upon honour, and calumnies; in a word, for all crimes which render the presence of the offender particularly disagreeable and mortifying to the party offended.

In the employment of this punishment, care must be taken that power be not given to the party injured to banish the offender from places in which he is carrying on his habitual operations, or where his presence may be necessary for the discharge of any particular duty. Hence it will, in many cases, be found indispensable to make exceptions in respect of churches, courts of justice, markets, and political assemblies.

Instances in which this mode of punishment has been employed may be found in the de-

crees of the French Parliaments. It will be sufficient to mention one instance. A man of the name of *Aujay* having insulted a lady of rank in the most gross manner, among other punishments he was ordered, under pain of corporal punishment, to retire immediately from every place at which this lady might happen to be present.*

In the "Intrigues of the Cabinet" may be seen the account of a quarrel between Madame de Montbazon and the Princess de Condé, in the course of which the former was guilty of very gross insults towards the Princess. The Queen, Anne of Austria, ordered that Madame Montbazon should retire from every place at which the Princess was present.†

Under the English law, there are various instances in which, though not under the name of punishment, restrictions are imposed upon certain classes of persons. Catholics were formerly not allowed to exercise either the profession of the law or that of medicine. Persons refusing to take the sacrament according to the rites of the Church of England, were excluded from all public offices.

Such was the law; the practice was always otherwise: in point of fact, a very large proportion of offices, civil and military, were filled by persons who had never taken the oaths required, but who were protected from the penalties to which they would otherwise have been subjected, by an annual bill of indemnity. In point of right, the security thus afforded was a precarious one, but the uninterrupted practice of nearly a century left little room for apprehension on the part of the persons interested.

The restrictions here in question were not designed to operate as punishments; they were originally imposed with a view of avoiding the danger which, it was apprehended, might be incurred by vesting in the hands of persons of certain religious persuasions, situations of public trust. This, at least, was the avowed political reason: the true cause of the exclusion was, however, religious animosity: they were acts of antipathy.

But these were not the only motives: self-interest had its share in producing the exclusion. Exclude one set of persons, and you confer a benefit on another set: those to whom the right is reserved have to contend with a smaller number of competitors, and their prospect of gain is increased. These restrictive laws, originating in religious hatred, were afterwards maintained by injustice; the persecution, begun by misguided bigotry, was persisted in long after the original inducement had been forgotten, from the most sordid injustice. This is the short history of the persecutions in Ireland. For the benefit of the Protestants, the restrictive laws against the Catholics were kept in force: out of eight millions of inhabitants, a selection was made of one million, on whom were conferred all offices of power or of profit. In this state of things, whilst privileges are, by the continuance of the persecuting laws, placed in the hands of the persecutors, the procuring their abolition may be expected to be attended with no small difficulty. The true motive — the sordid one — will long be concealed under the mask of religion.

Though it may be said that these restrictions are not designed to operate as punishments, and that, in the making of this general law, no particular individual was aimed at, yet there results from it a distinction injurious to the particular class of persons affected by it — necessarily injurious, since the continuance of the law can be justified only by supposing them to be dangerous and disloyal. Such laws form a nucleus around which public prejudice collects; and the legislator, by acquiescing in these transient jealousies, strengthens them, and renders them permanent. They are the remnants of a disease which has been universal, and which, after its cure, has left behind it deep and lasting scars.

CHAPTER X.

OF ACTIVE OR LABORIOUS PUNISHMENT.

Active punishment is that which is inflicted on a man by obliging, or, to use another word, compelling him to act in this or that particular way; to exert this or that particular species of action.

There are two kinds of means by which a man may be compelled to act — physical and moral: the first applies itself to his body; the other to his mind, to his faculty of volition.

The actions which a man may be compelled to perform by physical means are so few, and so unprofitable, both to the patient and to others, as not to be worth taking into the account.

When the instrument is of the moral kind, it is by acting on the volition that it produces its effect. The only instrument that is of a nature to act immediately upon the volition, is an idea; but not every idea — only an idea of pleasure or of pain, as about to ensue from the performance or non-performance of the act which is the object of the volition.

It cannot be an idea of pleasure which can so act upon the volition as to give birth to an act the performance of which shall be a punishment; it must therefore be an idea of pain — of any pain, no matter what, so it be to appearance greater than the pleasure of abstaining from the performance of the penal act.

* Causes Celèbres, tom. iv. p. 307.
† Anquetil, tom. iii.

It is manifest, therefore, that when a punishment of the laborious kind is appointed, another punishment must necessarily be appointed along with it. There are, therefore, in every such case, two different punishments, at least, necessarily concerned. One, which is the only one directly and originally intended, the laborious punishment itself; which may be styled the *principal* or *proper* punishment: the other, in case of the former not being submitted to, is called in to its assistance, and may be styled the *subsidiary* punishment.

This subsidiary punishment may be of any kind that, in point of quantity, is great enough. It ought not, however, to be likewise of the laborious kind; since in that case, as well as in the case of the principal punishment, the will of the patient is necessary to constitute the punishment; and to determine the will, some incident is necessary that does not depend upon the will. It will be necessary, therefore, to employ such punishments as are purely passive, or those restrictive punishments in which the instrument is purely physical.

In regard to this class of punishments, one thing is here to be noted with reference to the instrument. In punishments of this kind, there is a link or two interposed between the instrument and the pain produced by means of it. The instrument first produces the volition; that volition produces a correspondent external act: and it is that act which is the immediate cause by which the pain here in question is produced. This punishment, then, we see, has this remarkable circumstance to distinguish it from other punishments: it is produced immediately by the patient's own act; it is the patient who, to avoid a greater punishment, inflicts it on himself.

What, then, is the sort of act that is calculated to produce pain in the case of active punishment? It admits not of any description more particular than this: that it is any act whatever that a man has a mind not to do; or, in other words, that on any account whatever is disagreeable to him.

An occupation is a series of acts of the same kind, or tending to the same end. An occupation may be disagreeable on a positive or a negative account; as being productive, in a manner more or less immediate, of some positive pain, or as debarring from the exercise of some more agreeable occupation.

Considered in itself, an occupation may be either painful, pleasurable, or indifferent; but continued beyond a certain time, and without interruption (such is the constitution of man's nature,) every occupation whatsoever becomes disagreeable: not only so, but such as were in the beginning pleasurable become, by their continuance, more disagreeable than such as were originally indifferent.*

To make the sum of his occupations pleasurable, every man must therefore be at liberty to change from one to another, according to his taste. Hence it is, that any occupation which, for a certain proportion of his time, a man is compelled to exercise, without the liberty of changing to another, becomes disagreeable, and in short becomes a punishment.

Active punishments are as various as the occupations in which, for the various purposes of life, men can have occasion to be employed. These being usually inflicted on all offenders indiscriminately, have been such as all offenders indiscriminately have been physically qualified to undergo. They have consisted commonly in various exertions of muscular force, in which there has been little or no dexterity required in the manner of its application. In general, they have been such as to produce a *profit* — a collateral benefit in addition to that expected from the punishment as such.

Among the modes of penal labour, a very common one has been that of rowing. This is an exercise performed chiefly by main strength, with very little mixture of skill, and that presently attained. Some vessels, of a bulk large enough to bear any sea, have been made so as to be put in motion in this manner, even without the help of sails. This occupation is more unpleasant in itself than that of an ordinary seaman, as having less variety, besides that the rowers are confined by chains. Such vessels are called gallies, and the rowers galley-slaves. This punishment, though unknown in England, is in use in most of the maritime states of Europe, and particularly in the Mediterranean and Adriatic Seas.

In many countries, malefactors have been employed in various public works, as in the cleansing of harbours † and the streets of towns, in making roads, building and repairing fortifications, and working in mines.

Working in the mines is a punishment employed in Russia and in Hungary. In Hungary, the mines are of quicksilver, and the unwholesome effects of that metal, upon a person who is exposed to the effluvia of it for a length of time, may be one reason for

* To eat grapes, for instance, is what, at certain times at least, will probably be to most men rather an agreeable occupation: to pick them an indifferent one. But in two or three hours, for example, the eating them will become intolerable, while the picking them may still remain, perhaps, in itself nearly a matter of indifference.

† The employment of malefactors for the cleaning of harbours was, for the first time, introduced into this country in the year 1776, by stat. 16 Geo. III. c. 43.

employing criminals in that work, in preference to other persons.

Beating hemp is the most common employment which delinquents are put to in our workhouses — persons of both sexes being subjected to it, without distinction.

From the nature of the service, active punishments may be distinguished into two sorts — specific and indiscriminate. I call it specific, when it consists in the being obliged to do such and such a particular kind or kinds of work: indiscriminate, when it consists in the being obliged to do, not any kind of work in particular, but every kind of work in general, which it shall please such or such a person to prescribe. If such person take all the profit of the work, he is called a master: if the profit is received by some other person, he is called a keeper, or overseer. There are cases of a mixed nature, in which, in certain respects, the servitude is indiscriminate; as to other respects, specific.

At Warsaw, before the partition of Poland, there was a public workhouse, in which convicts were confined in ordinary to particular employments determined by the laws or custom of the place. To this workhouse, however, any person who thought proper might apply, and upon giving security for their forthcomingness, and paying a certain stipulated price for their use, a certain number of the convicts were allotted to him, to be employed in any piece of work for a given time. The services they were employed upon were generally of a rough kind, such as digging a ditch, or paving a court; and a soldier, or a party of soldiers, according to the number of convicts thus employed, was placed over them as a guard.

This custom was also in use in Russia.*

This distinction between specific and indiscriminate servitude, may be illustrated by two examples derived from the English law.

The example of specific punishment is afforded by the statute which directs the employment of certain malefactors on board the hulks, in improving the navigation of the Thames. The statute determines the kind of labour, and the subsidiary punishments by which it is to be enforced.

Indiscriminate servitude is part of the punishment inflicted by our laws under the name of transportation. This servitude is sometimes limited as to its duration, but is without limitation, and without restriction, in respect of the services which may be required.

All these kinds of labour, whether indiscriminate or specific, require, as a necessary accompaniment, that the individual should be upon that spot where the business is to be done. Some import imprisonment; all of them import restraint upon occupations, to wit, upon all occupations incompatible with those in which they constrain a man to employ himself. The degree of this restraint is in a manner indefinite. To lay a man, therefore, under a particular constraint of any kind, is for that time to lay him under an almost universal restraint. The clear value, then, of the pleasure which a man loses by being compelled to any particular occupation, is equal to that of the greatest of all the pleasures which, had it not been for the compulsion, he might have procured for himself.

Upon examining laborious punishment, we shall find it to possess the properties to be wished for in a mode of punishment, in greater perfection, upon the whole, than any other single punishment.

1. It is *convertible to profit*. Labour is in fact the very source of profit: not that, after all, its power in this way is so extensive as that of pecuniary punishment; for, from the punishment of one man in this way, all the profit that is to be reaped is that which is producible by the labour of one man — a limited, and never very ample quantity. On the other hand, from the punishment of a man in the pecuniary way, it may happen that a profit shall be reaped equal to the labour of many hundred men. The difference, however, in favour of this punishment is, that money is a casual fund; labour one that cannot fail. Indeed, upon the whole, though pecuniary punishment be in particular instances capable of being more profitable, yet considering how large a proportion of mankind, especially of those most liable to commit the most frequent and troublesome kinds of crimes, have no other possession worth estimating than their labour, laborious punishment, if managed as it might and ought to be, may perhaps be deemed the most profitable upon the whole.

2. In point of *frugality* to the state, laborious punishment, considered by itself, is as little liable to objection as any other can be. I say, considered by itself; for, when coupled with imprisonment, as it can hardly but be in the case of public servitude, it is attended with those expenses to the public which have been noticed under the article of imprisonment. These, however, are not to be charged to the account of the laborious part of the punishment: so that the advantage which laborious punishment has on this score, over simple imprisonment, is quite a

* See the Abbé Chappé's travels in that country. The Abbé had particular reason to remember it. Wanting, for the purpose of some experiment, to have the earth dug, he was complimented with the use of a dozen of these poor prisoners. Having given them some money to purchase liquor, they employed it in making their guard drunk, and then took to flight. — Vol. I. page 149.

clear one. But the former of these two punishments, though separable from the latter in idea, is not separable in practice. Imprisonment may be made to subsist without labour; but forced labour cannot be made to subsist without imprisonment. The advantage, then, which servitude has in this respect, when compared with imprisonment, ceases when compared with any other mode of punishment. However, the profit gained by the one part is enough, under good management, to do more than balance the expense occasioned by the other; so that, upon the whole, it has the advantage, in point of economy, over any other mode of punishment but pecuniary.

3. It seems to stand equally clear of objection in point of *equability*. As to the restraint it involves, it accommodates itself of itself to each man's circumstances; for, with respect to each man, it has the effect of restraining him from following those occupations, whatever they may be, which are to him most pleasurable. The positive servitude itself will be apt to sit heavier on one man than another. A man who has not been used to any kind of labour will suffer a good deal more, for some time at least, than one who has been used to labour, though of a different kind or degree from that in question. But this inconvenience may be pretty well obviated by a proper attention to the circumstances of individuals.

4. In point of *variability*, though it is not perfect throughout, yet it is perfect as far as it goes. In a very low degree it is not capable of subsisting, on account of the infamy it involves, at least in a country governed by European manners. One of the most odious acts of the reign of the Emperor Joseph II. was the sentencing persons of high rank to labour in the public works. The Protestants of France considered the condemnation of their religious ministers to the galleys as a personal insult done to themselves: in this respect, then, it falls short of pecuniary punishment. After that exception, it is capable of being varied to the utmost nicety: being variable as well in respect of intensity, as of duration.

5. In point of *exemplarity*, it has no peculiar advantage; neither is it subject to any disadvantage. Symbols of suffering it has none belonging to itself; for the circumstance which distinguishes penal servitude from voluntary labour is but an internal circumstance — the idea of compulsion operating on the patient's mind. The symbols, however, that belong necessarily to the punishment it is naturally combined with — I mean imprisonment — apply to it of course; and the means of characterizing the condition of the patient by some peculiarity of dress are so obvious, that these may be looked upon as symbols naturally connected with it.

6. In point of *subserviency to reformation*, it is superior to any other punishment, except that mode of imprisonment which we have already insisted on as being peculiarly adapted to this purpose.* Next to the keeping of malefactors asunder, is the finding them employment while they are together. The work they are engaged in confines their attention in some measure: the business of the present moment is enough to occupy their thoughts; they are not stimulated by the impulse of *ennui* to look out for those topics of discourse which tend, in the manner that has been already explained, to fructify the seeds of corruption in their minds: they are not obliged, in search of aliment for speculation, to send back their memory into the field of past adventures, or to set their invention in quest of future projects. This kind of discipline does not, indeed, like the other, pluck up corruption by the roots; it tends, however, to check the growth of it, and render the propensity to it less powerful. Another circumstance, relative to the nature of this discipline, contributes to check the progress of corruption: to insure the performance of their tasks, it is necessary that the workmen should be under the eye of overseers. The presence of these will naturally be a check to them, and restrain them from engaging in any criminal topics of discourse.

So much for the tendency which this punishment has to keep men from growing worse. It has, besides this, a positive tendency to make them better. And this tendency is more obvious and less liable to accident than the other. There is a tendency, as has been already observed, in man's nature, to reconcile and accommodate itself to every condition in which it happens to be placed. Such is the force of habit. Few occupations are so irksome that habit will not in time make them sit tolerably easy. If labour, then, even though forced, will in time lose much of its hardship, how much easier will it become when the duration and the mode are in some measure regulated by the will of the labourer himself; when the bitter ideas of infamy and compulsion are removed, and the idea of gain is brought in to sweeten the employment; in a word, when the labourer is left to work at liberty and by choice!

7. This mode of punishment is not altogether destitute of *analogy*, at least of the verbal kind, to that class of crimes which are the most frequent, and for which an efficacious punishment is most wanted — crimes, I mean, that result from a principle of rapacity or of sloth. The slothful man is constrained to work: the vagabond is confined to a parti-

* Supra, p. 425.

cular spot. The more opposite the restraint thus imposed is to the natural inclination of the patient, the more effectually will he be deterred from indulging his vicious propensities, by the prospect of the punishment that awaits him.

8. With regard to the popularity of this species of punishment in this country, the prejudices of the people are not quite so favourable to it as could be wished. Impatient spirits too easily kindled with the fire of independence, have a word for it, which presents an idea singularly obnoxious to a people who pride themselves so much upon their freedom. This word is slavery. Slavery they say, is a punishment too degrading for an Englishman, even in ruins. This prejudice may be confuted by observing — 1*st*, That public servitude is a different thing from slavery; 2*dly*, That if it were not, this would be no reason for dismissing this species of punishment without examination. If, then, upon examination, it is found not to be possessed, in a requisite degree, of the properties to be wished for in a mode of punishment, that, and not the name it happens to be called by, is a reason for its rejection: if it does possess them, it is not any name that can be given to it that can change its nature. But these observations have been more fully insisted on in the chapter on Popularity.

Having thus spoken of this species of punishment in general, let us stop a moment to consider the different kinds of labour which ought to be preferred.

The principal distinction is that of public and private labour.

In public works, the infamy of their publicity tends to render the individuals more depraved, than the habit of working tends to reform them. At Berne there are two classes of forced labourers — the one employed in cleaning the streets, and in other public works; the others employed in the interior of the prison. The latter, when set at liberty, rarely fall again into the hands of justice; the former are no sooner set at liberty than they are guilty of new crimes. This difference is accounted for at Berne, by the indifference to shame they contract in a service, the infamy of which is renewed day by day. It is probable, that after the notoriety of this disgrace, nobody in the country would like to hold communication with, or to employ them.

The rough and painful kinds of labour, which are ordinarily selected for this kind of punishment, do not generally seem suitable. It is difficult to measure the powers of individuals, or to distinguish real from simulated weakness. Subsidiary punishments must be proportioned to the difficulty of the labour, and to the indisposition to perform it. The authority with which an inspector must be armed is liable to great abuses; to rely upon his pity, or even upon his justice, in an employment which hardens the heart, betrays an ignorance of human nature; so soon as it becomes necessary to inflict corporal punishment, the individual who is charged with its execution will become degraded in his own opinion, and he will revenge himself by the abuse of his authority.

*Nam nil asperius humili qui surgit in altum.**

Labours which require great efforts ought to be performed by free labourers. The labour obtained by the force of fear is never equal to that which is obtained by the hope of reward. Constrained labour is always inferior to voluntary labour; not only because the slave is interested in concealing his powers, but also because he wants that energy of soul upon which muscular strength so much depends. It would be a curious calculation to estimate how much is lost from this cause in those states where the greater portion of labour is performed by slaves. It would tend greatly to prove that their gradual emancipation would be a noble and beneficial measure.

Labour in mines, except in particular circumstances, is little suitable for malefactors, partly for the reason above given, and partly from the danger of degrading this occupation. The ideas of crime and shame will soon be associated with it; miner and criminal would soon become synonymous: this would not be productive of inconvenience, if the number of malefactors were sufficient for working the mines; but if the contrary is the case, there might be a lack of workmen, from the aversion inspired towards this kind of labour, in those who used to exercise it voluntarily, or who are at liberty to choose respecting it.

CHAPTER XI.

CAPITAL PUNISHMENT.

Capital punishment may be distinguished into — 1*st*, simple; 2*d*, afflictive.

I call it *simple*, when, if any bodily pain be produced, no greater degree of it is produced than what is necessary to produce death.

I call it *afflictive*, when any degree of pain is produced more than what is necessary for that purpose.

It will not be necessary, upon the present occasion, to attempt to give an exhaustive view of all the possible modes by which death might be produced without occasioning any, or the least possible quantity of collateral suffering. The task would be almost an endless one: and when accomplished, the only use to which it could be applied would be that of affording an opportunity of selecting out of the catalogue the mode that seemed to

* Claudian.

possess the desired property in the greatest perfection, which may readily be done without any such process.

The mode in use in England is far from being the best that could be devised. In strangulation by suspension, the weight of the body alone is seldom sufficient to produce an immediate and entire obstruction of respiration. The patient, when left to himself, struggles for some time: hence it is not uncommon for the executioner, in order to shorten his sufferings, to add his own weight to that of the criminal. Strangling by the bowstring may to some, perhaps, appear a severer mode of execution; partly from the prejudice against every usage of despotic governments, partly by the greater activity exerted by the executioners in this case than in the other. The fact, however, is, that it is much less painful than the other, for it is certainly much more expeditious. By this means the force is applied directly in the direction which it must take to effect the obstruction required: in the other case, the force is applied only obliquely; because the force of two men pulling in that manner is greater than the weight of one man.

It is not long, however, even in hanging, before a stop is put to sense; as is well enough known from the accounts of many persons who have survived the operation. This probably is the case a good while before the convulsive strugglings are at an end; so that in appearance the patient suffers more than he does in reality.

With respect to beheading, there are reasons for supposing that the stop put to sensation is not immediate: a portion of sensibility may still be kept up in the spinal marrow a considerable time after it is separated from the brain. It is so, at least, according to all appearance, for different lengths of time in different animals and insects, which continue to move after their heads are separated from their bodies.

§ 2. *Afflictive Capital Punishment.*

To exhaust this part of the subject, it would be necessary to make a catalogue of every various punishment of this description, of which, in practice, there has been any example, adding to them such others as the imagination could be made to supply; but, the ungrateful task performed, of what use would it be? We shall the more willingly refrain from any such labour, as in the more modern European codes these punishments have been altogether discarded; and in those in which they have not been formally abolished, they have long fallen into desuetude. Let us rejoice in these improvements: there are few opportunities in which the philosopher can offer to the governors of the world more just or more honourable congratulations. The importance of the subject, however, will not admit of its being passed over in perfect silence. The system of jurisprudence in question has been too long established; it has had too many apologists, and has had for its supporters too many great names, to allow of its being altogether omitted in a work expressly treating on the subject of punishment. It may besides be of use to show that reason concurs with humanity in the condemning punishments of this description, not merely as being useless, but as producing effects contrary to the intention of the legislator.

If the particular nature of the several species of punishments of this description be examined, as well those that have for a long time past been abolished, such as crucifixion and exposure to wild beasts, as those that have been in use in various parts of modern Europe, such as burning, empaling, tearing to pieces, and breaking on the wheel, it will be found in all of them that the most afflictive part consists in their *duration:* but this circumstance is not of a nature to produce the beneficial effect that may have been expected from it.

When any particular species of punishment is denounced, that part of it which takes the strongest hold of the imagination is its *intensity:* its duration makes a much more feeble impression. A slight apparent addition of organical suffering made to the ordinary mode of inflicting the punishment of death, produces a strong effect upon the mind: the idea of the duration of its pains is almost wholly absorbed by the terrors of the principal part of the punishment.

In the legal description of a punishment, its duration is seldom (distinctly) brought to view; it is not mentioned, because in itself it is naturally uncertain: it depends partly upon the physical strength of the patient, and partly upon various other accidental circumstances. To this remarkable and important feature of this species of punishment there is no means by which the attention can be drawn and fixed upon it: upon those who reflect, it produces no impression; upon those who do not reflect, it is altogether lost.

It is true, that the duration of any particular punishment might be fixed by law; the number of hours or minutes might be determined, which should be employed in performing the several prescribed manipulations. This obviously would be a mode of fixing the attention upon this particular feature of the punishment: but even this mode, perfect as it may appear to be, would be found very inadequate to produce the desired effect. By the help of pictures, the intensity of any particular species of punishment may be more or less faithfully represented; but to represent its duration is impossible. The flames,

the rack, and all the engines of torture, together with the convulsive throes of the half-expiring and wretched sufferer, may be depicted, but time cannot. A punishment that is to be made to last for two hours will not appear different from a punishment that is to last only a quarter of an hour. The deficiencies of art may, to a certain degree, be compensated for by the imagination: but even then the reality will be left far behind.

It is true, that upon bystanders the duration of the punishment is calculated to make a strong impression; but even upon them, after a certain time, the prolongation loses its effect, and gives place to a feeling directly opposite to that which it is desirable to produce — sentiments of pity and sympathy for the sufferer will succeed, the heart of the spectator will revolt at the scene he witnesses, and the cry of suffering humanity will be heard. The physical suffering will not be confined to the offender: the spectators will partake of it: the most melancholy accidents, swoonings, and dangerous convulsions, will be the accompaniments of these tragic exhibitions. These sanguinary executions, and the terrific accounts that are spread concerning them, are the real causes of that deep-rooted antipathy that is felt against the laws and those by whom they are administered — an antipathy which tends to multiply offences, by favouring the impunity of the guilty.

The only reason that can be given by any government, that persists in continuing to employ a mode of punishing so highly penal, is, that the habitual condition of the people is so wretched that they are incapable of being restrained by a more lenient kind of punishment.

Will it be said that crimes are more frequent in countries in which punishments such as those in question are unknown? The contrary is the fact. It is under such laws that the most ferocious robbers are found: and this is readily accounted for. The fate with which they are threatened hardens them to the feelings of others as well as their own: they are converted into the most bitter enemies, and every barbarity they inflict is considered as a sort of reprisal.

Upon this subject, as upon so many others, Montaigne was far beyond the age in which he lived. All beyond simple death (he says) appears to me to be cruelty. The legislator ought not to expect that the offender that is not to be deterred by the apprehension of death, and by being beheaded and hanged, will be more effectually deterred by the dread of being exposed to a slow fire, or the rack. And I do not know, indeed, but that he may be rendered desperate.*

By the French Constituent Assembly, afflictive punishments were abolished. In the *Code Napoléon*, beheading is the mode prescribed for inflicting the punishment of death. And it is only in the case of parricide, and of attempts made upon the life of the sovereign, that to the simple punishment of death the characteristic afflictive punishment of cutting off the hand of the offender is added.

In this country, the only crime for which afflictive punishment is in use, is that of high treason. The judgment in high treason consists of seven different operations of the afflictive kind: 1. Dragging at a horse's tail along the streets from the prison to the place of execution; 2. Hanging by the neck, yet not so as entirely to destroy life; 3. Plucking out and burning of the entrails while the patient is yet alive; 4. Beheading; 5. Quartering; 6. Exposure of the head and quarters in such places as the king directs. This mode of punishment is not now in use. In favour of nobility, the judgment has been usually changed into beheading; in favour of the lower classes, into hanging.

I wish that upon this part of our subject we could end here; but unfortunately there remains to be mentioned an afflictive mode of punishment, most excruciating, and more hideous than any of which we have hitherto spoken, and which is still in use: it is not in Europe that it is employed, but in European colonies — in our own West India Islands.

The delinquent is suspended from a post by means of a hook inserted under his shoulder, or under his breast bone. In this manner the sufferer is prevented from doing anything to assist himself, and all persons are prohibited, under severe penalties, from relieving him. He remains in this situation, exposed to the scorching heat of the day, where the sun is almost vertical, and the atmosphere almost without a cloud, and to the chilling dews of the night; his lacerated flesh attracts a multitude of insects, which increase his torments, and under the fever produced by these complicated sufferings, joined to hunger and thirst, all raging in the most intense degree, he gradually expires.

When we reflect on this complication of sufferings, their intensity surpasses everything that the imagination can figure to itself, and consider that their duration continues not merely for many hours, but for many days, it will be found to be by far the most severe punishment ever yet devised by the ingenuity of man.

The persons to whom this punishment has been hitherto appropriated are negro slaves, and their crime, what is termed rebellion, because they are the weakest, but which, if

* Liv. ii. ch. 27. — *Cowardice the mother of cruelty.*

Et lupus et turpes instant morientibus ursi
Et quæcunque minor nobilitate fera est.
Ovid.

they were the strongest, would be called an act of self-defence. The constitutions of these people are, to their misfortune, in certain respects so much harder than ours, that many of them are said to have lingered ten or twelve days under these frightful torments.

It is said that this punishment is nothing more than is necessary for restraining that people, and keeping them in their servile state; for that the general tenor of their lives is such a scene of misery, that simple death would be generally a relief, and a death less excruciating would scarce operate as a restraint.

This may perhaps be true. It is certain that a punishment, to have any effect upon man, must bear a certain ratio to the mean state of his way of living, in respect of sufferings and enjoyments. But one cannot well help observing where this leads. The number of slaves in these colonies is to that of freemen as about six to one; there may be about three hundred thousand blacks and fifty thousand whites. Here there are three hundred thousand persons kept in a way of life that upon the whole appears to them worse than death, and this for the sake of keeping fifty thousand persons in a way of life not remarkably more happy than that which, upon an average, the same number of persons would be in where there was no slavery; on the contrary, it is found that men in general are fond, when they have the opportunity, of changing that scene for this. On the other hand, it is not to be disputed that sugar and coffee, and other delicacies, which are the growth of those islands, add considerably to the enjoyments of the people here in Europe; but taking all these circumstances into consideration, if they are only to be obtained by keeping three hundred thousand men in a state in which they cannot be kept but by the terror of such executions: are there any considerations of luxury or enjoyment that can counterbalance such evils?

At the same time, what admits of very little doubt is, that the defenders of these punishments, in order to justify them, exaggerate the miseries of slavery, and the little value set by the slaves upon life. If they were really reduced to such a state of misery as to render necessary laws so atrocious, even such laws would be insufficient for their restraint; having nothing to lose, they would be regardless of all consequences; they would be engaged in perpetual insurrections and massacres. The state of desperation to which they would be reduced would daily produce the most frightful disorders. But if existence is not to them a matter of indifference, the only pretence that there is in favour of these laws falls to the ground. Let the colonists reflect upon this: if such a code be necessary, the colonies are a disgrace and an outrage on humanity: if not necessary, these laws are a disgrace to the colonists themselves.

CHAPTER XII

CAPITAL PUNISHMENT EXAMINED.*

In making this examination, the following plan will be pursued. The advantageous properties of capital punishment will in the first place be considered: we shall afterwards proceed to examine its disadvantageous properties. We shall, in the last place, consider the collateral ill effects resulting from this mode of punishment: effects more remote and less obvious, but sometimes more important, than those which are more immediate and striking.

The task thus undertaken would be an extremely ungrateful and barren one, were it not that the course of the examination will lead us to make a comparison between this and other modes of punishment, and thus to ascertain which is entitled to the preference. On the subject of punishment, the same rule ought, in this respect, to be observed as on the subject of taxes. To complain of any particular tax as being an injudicious one, is to sow the seeds of discontent, and nothing more: to be really useful, this in itself mischievous discovery, should be accompanied by the indication of another tax which will prove equally productive, with less inconvenience.

§ 1. *Advantageous Properties of the Punishment of Death.*

1. The most remarkable feature in the punishment of death, and that which it possesses in the greatest perfection, is the taking from the offender the power of doing further injury: whatever is apprehended, either from the force or cunning of the criminal, at once vanishes away; society is in a prompt and complete manner delivered from all alarm.

2. It is *analogous* to the offence in the case of murder; but there its analogy terminates.

3. It is *popular* in respect of that same crime, and in that alone.

4. It is *exemplary* in a higher degree, perhaps, than any other species of punishment, and in countries in which it is sparingly employed, an execution makes a deep and lasting impression.

It was the opinion of *Beccaria*, that the impression made by any particular punishment was in proportion to its duration, and not to its intensity. "Our sensibility," he observes, "is more readily and permanently affected by slight but reiterated attacks, than by a violent but transient affection. For this

* See also Appendix, Letter to the French Nation, on Death Punishment.

reason, the putting an offender to death forms a less effectual check to the commission of crimes, than the spectacle of a man kept in a state of confinement, and employed in hard labour, to make some reparation by his exertions for the injury he has inflicted on society."*

Notwithstanding such respectable authority, I am apt to think the contrary is the case. This opinion is founded principally on two observations: 1. Death in general is regarded by most men as the greatest of all evils, and they are willing to submit to any other suffering whatever in order to avoid it. 2. Death, considered as a punishment, is almost universally reckoned too severe, and men plead, as a measure of mercy, for the substitution of any other punishment in lieu of it. In respect to duration, the suffering is next to nothing. It must therefore, I think, be some confused and exaggerated notion of the intensity of the pain of death, especially of a violent death, that renders the idea of it so formidable. It is not without reason, however, that, with respect to the higher class of offenders, M. Beccaria considers a punishment of the laborious kind, moderate we must suppose in its degree, will make a stronger impression than the most excruciating kind of death that can be devised. But for the generality of men, among those who are attached to life by the ties of reputation, affection, enjoyment, hope, capital punishment appears to be more exemplary than any other.

5. Though the *apparent* suffering in the punishment of death is at the highest pitch, the real suffering is perhaps less than in the larger portion of afflictive punishments. In addition to their duration, they leave after them a train of evils which injure the constitution of the patient, and render the remainder of his life a complication of sufferings. In the punishment of death, the suffering is momentary: it is a negation of all sensation.

When the last moment only is considered, penal death is often more gentle than natural death, and, so far from being an evil, presents a balance of good. The suffering endured must be sought for in some anterior period. The suffering consists in *apprehension*. This apprehension commences from the moment the delinquent has committed the crime; it is redoubled when he is apprehended; it increases at every stage of the process which renders his condemnation more certain, and is at its height in the interval between sentence and execution.

The more solid argument in favour of the punishment of death, results from the combined force of the above considerations. On the one hand, it is, to men in general, of all punishment, of the greatest apparent magnitude, the most impressive, and the most exemplary; and on the other hand, to the wretched class of beings that furnish the most atrocious criminals, it is less rigorous than it appears to be. It puts a speedy termination to an uneasy, unhappy, dishonoured existence, stript of all true worth:—*Heu! Heu! quam male est extra legem viventibus.*†

§ 2. *Desirable Penal Qualities which are wanting in Capital Punishment.*

1. The punishment of death is not *convertible to profit:* it cannot be applied to the purpose of compensation. In so far as compensation might be derived from the labour of the delinquent, the very source of the compensation is destroyed.

2. In point of *frugality*, it is pre-eminently defective. So far from being convertible to profit, to the community it produces a certain loss, both in point of wealth and strength. In point of wealth, a man chosen at random is worth to the public that portion of the whole annual income of the state which results from its division by the number of persons of which it consists. The same mode of calculation will determine the loss in respect of strength. But the value of a man who has been proved guilty of some one or other of those crimes for which capital punishment is denounced, is not equal to that of a man taken at random. Of those by whom a punishment of this sort is incurred, nine out of ten have divested themselves of all habits of regular industry: they are the *drones* of the hive; and with respect to them, death is therefore not an ineligible mode of punishment, except in comparison with confinement and hard labour, by which there is a chance of their being reformed, and rendered of some use to society.

3. *Equability* is another point, and that a most important one, in which this punishment is eminently deficient. To a person taken at random, it is upon an average a very heavy punishment, though still subject to considerable variation; but to a person taken out of the class of first-rate delinquents, it is liable to still greater variation: to some it is as great as to a person taken at random; but to many it is next to nothing.

Death is the absence of all pleasures indeed, but at the same time of all pains. When a person feels himself under temptation to commit a crime punishable with death, his determination to commit it, or not to commit it, is the result of the following calculation: He ranges on one side the clear portion of happiness he thinks himself likely to enjoy in case of his abstaining: on the other, he places the clear happiness he thinks

* Des Delits et des Peines.—Sect. xvi.

† Petron. Satyr.

himself likely to enjoy in case of his committing the crime, taking into the account the chance there appears to him to be, that the punishment threatened will abridge the duration of that happiness.

Now then, if in the former case there appear to be no clear happiness likely to accrue to him, much more if there appear to be a clear portion of unhappiness; in other words, if the clear portion of happiness likely to befal him appear to be equal to 0,* or much more if it appear to be negative, the pleasure that constitutes the profit of the crime will act upon him with a force that has nothing to oppose it: the probability of seeing it brought to an abrupt period by death will subtract more or less from the balance; but at any rate there will be a balance.

Now this is always the case with a multitude of malefactors. Rendered averse to labour by natural indolence or disuse, or hurried away by the tide of some impetuous passion, they do look upon the pleasures to be obtained by honest industry as not worth living for, when put in competition with the pains; or they look upon life as not worth keeping, without some pleasure or pleasures which, to persons in their situation, are not attainable but by a crime.

I do not say that this calculation is made with all the formality with which I have represented it: I do not say that in casting up the sum of pains on the one side, and pleasures on the other, exact care is always used to take every item into the account. But however, well or ill, the calculation is made; else a man could not act as he is supposed to do.

Now then, in all these cases, which unhappily are but too frequent, it is plain the punishment of death can be of no use.

It may be said, no more would any other punishment; for any other punishment, to answer its purpose, must have the effect of deterring or otherwise disabling the person in question from committing the like crimes in future. If, then, he is thus deterred or disabled, he is reduced to a situation in which, by the supposition, death was to him an event desirable upon the whole. Being, then, in his power, he will produce it.

The conclusion, however, is not necessary. There are several reasons why the same impulse which is strong enough to dispose a man to meet death at the hands of justice should not be strong enough to dispose him to bring on himself that event with his own hand.

In the first place, the infliction of it as a punishment is an event by no means certain. It is in itself uncertain; and the passion he is supposed to be influenced by, withdrawing his attention from the chances that are in favour of its happening, makes it look still more uncertain.

In the next place, although it were certain, it is at any rate distant: and the mortification he undergoes, from the not possessing the object of his passion, is present.

Thirdly, death is attended with much more pain when a man has to inflict it on himself with his own hand, than when all he does is simply to put himself in a situation in which it will be inflicted on him by the hands of another, or by the operation of some physical cause. To put himself in such a situation, requires but a single and sudden volition, and perhaps but a single act in consequence, during the performance of which he may keep his eyes shut, as it were, against the prospect of the pain to which he is about to subject himself: the moment of its arrival is at an uncertain distance. The reverse is the case where a man is to die by his own hand. His resolution must be supported during the whole period of time that is necessary to bring about the event. The manner is foreseen, and the time immediate. It may be necessary, that even after a part of the pain has been incurred, the resolution should go on and support itself, while it prompts him to add further pain before the purpose is accomplished.

Accordingly, when people are resolved upon death, it is common for them, when they have an opportunity, to choose to die rather by the hand of another than by their own. Thus Saul chose to die by the hand of his armour-bearer; Tiberius Gracchus by that of his freeman; so again the Emperor Nero by one of his minions.

Fourthly, when a man is prompted to seek relief in death, it is not so much by the sudden vehemence of some tempestuous passion, as by a close persuasion that the miseries of his life are likely to be greater than the enjoyments; and, in consequence, when the resolution is once taken, to rest satisfied without carrying it immediately into effect; for there is not a more universal principle of human conduct, than that which leads a man to satisfy himself for awhile with the power, without proceeding immediately, perhaps without proceeding ever, to the act. It is the same feeling which so often turns the voluptuous man to a miser.

Now this is likely enough to be the condition of those who, instead of death, may have been sentenced to another punishment. They defer the execution of their design from hour to hour—sometimes for want of means, sometimes for want of inclination; till at last some incident happens that puts in their heads a train of thought which in the end diverts them from their resolution. In the mental, as well as in the material part of the human frame, there is happily a strong

* Zero.

disposition to accommodate itself by degrees to the pressure of forced and calamitous situations. When a great artery is cut or otherwise disabled, the circumjacent smaller ones will stretch and take upon themselves the whole duty of conveying to the part affected the necessary supplies. Loss of sight improves the faculty of feeling; a left hand learns to perform the offices of the right, or even the feet, of both; an inferior part of the alimentary canal has learned to perform the office, and even to assume the texture of the stomach.

The mind is endowed with no less elasticity and docility, in accommodating itself to situations which at first sight appeared intolerable. In all sufferings there are occasional remissions, which, in virtue of the contrast, are converted into pleasure. How many instances are there of men who, having suddenly fallen from the very pinnacle of grandeur into the gulphs of misery, have, when the old sources of enjoyment were irrecoverably dry, gradually detached their minds from all recollections of their customary enjoyments, and created for themselves fresh sources of happiness. The Comte de Lauzun's spider, the straw-works of the Bicêtre, the skilfully wrought pieces of carved work made by the French prisoners, not to mention others, are sufficient illustrations of this remark.

Variability is a point of excellence in which the punishment of death is more deficient than in any other. It subsists only in one degree; the quantity of evil can neither be increased nor lessened. It is peculiarly defective in the case of the greater part of the most malignant and formidable species of malefactors — that of professed robbers and highwaymen.*

4. *The punishment of death*† *is not remissible.* Other species of afflictive punishments, it is true, are exposed to the same objection; but though irremissible they are not irreparable: for death there is no remedy.

No man, how little soever he may have attended to criminal procedure, but must have been struck at the very slight circumstances upon which the life of a man may depend; and who does not recollect instances in which a man has been indebted for his safety to the occurrence of some unlooked-for accident, which has brought his innocence to light? The risk incurred is doubtless greater under some systems of jurisprudence than under others. Those which allow the torture to supply the insufficiency of evidence derived from other sources; those in which the proceedings are not public, are, if the expression may be used, surrounded with precipices. But it may be said, is there, or could there be devised, any system of penal procedure which could insure the judge from being misled by false evidence or the fallibility of his own judgment? No; absolute security in this branch of science is a point which, though it can never be attained, may be much more nearly approached than it has hitherto been. Judges will continue fallible; witnesses to depose falsehood, or to be deceived; whatever number may depose to the same fact, the existence of that fact is not rendered certain: as to circumstantial evidence, that which is deemed incapable of explanation, but by supposing the existence of the crime, may be the effect of chance, or of arrangements made with the view of producing deception. The only sort of evidence that appears entitled to perfect conviction, is the voluntary confession of the crime by the party accused; but this is not frequently made, and does not produce absolute certainty, since

* "Are you not aware that we are subject to one disease more than other men?" said a malefactor upon the rack to his companion, who shrieked from pain. When one observes the courage or brutal insensibility, when in the very act of being turned off, of the greater part of the malefactors that are executed at Newgate, it is impossible not to feel persuaded that they have been accustomed to consider this mode of ending their days as being to them a natural death — as an accident or misfortune, by which they ought no more to be deterred from their profession than soldiers or sailors are from theirs, by the apprehension of bullets or of shipwreck.

† There is an evil resulting from the employment of death as a punishment, which may be properly noticed here—*It destroys one source of testimonial proof.* The archives of crime are in a measure lodged in the bosoms of criminals. At their death, all the recollections which they possess relative to their own crimes and those of others perish. Their death is an act of impunity for all those who might have been detected by their testimony, whilst innocence must continue oppressed, and the right can never be established, because a necessary witness is subtracted.

Whilst a criminal process is going forward, the accomplices of the accused flee and hide themselves. It is an interval of anxiety and tribulation: the sword of justice appears suspended over their heads. When his career is terminated, it is for them an act of jubilee and pardon: they have a new bond of security, and they can walk erect. The fidelity of the deceased is exalted among his companions as a virtue, and received among them for the instruction of their young disciples, with praises for his heroism.

In the confines of a prison, this heroism would be submitted to a more dangerous proof than the interrogatories of the tribunals. Left to himself, separated from his companions, a criminal ceases to possess this feeling of honour which unites him to them. It needs only a moment of repentance to snatch from him those discoveries which he only can make; and without his repentance, what is more natural than a feeling of vengeance against those who caused him to lose his liberty, and who, though equally culpable with himself, yet continue in the enjoyment of liberty! He need only listen to his interest, and purchase, by some useful information, some relaxation of the rigour of his punishment.

instances have not been wanting, as in the case of witchcraft, in which individuals have acknowledged themselves guilty, when the pretended crime was impossible.

These are not purely imaginary apprehensions, drawn from the region of possibility: the criminal records of every country afford various instances of these melancholy errors; and these instances, which, by the concurrence of a number of extraordinary events, have attained notoriety, cannot fail to excite a suspicion that, though unknown, many other innocent victims may have perished.

It must not be forgotten either, that the cases in which the word evidence is most apt to be employed, are not unfrequently those in which the testimony adduced is exposed to most suspicion. When the pretended crime is among the number of those that produce antipathy towards the offender, or which excite against him a party feeling, the witnesses almost unconsciously act as accusers. They are the echoes of the public clamour; the fermentation goes on increasing, and all doubt is laid aside. It was a concurrence of such circumstances which seduced first the people, and then the judges, in the melancholy affair of *Calas*.

These melancholy cases, in which the most violent presumptions, which fall little short of absolute certainty, are accumulated against an individual whose innocence is afterwards recognised, carry with them their own excuse: they are the cruel effects of chance, and do not altogether destroy public confidence. To produce any such effect, we must be able to detect in such erroneous decisions proofs of temerity, ignorance, and precipitation, of an obstinate and blind adherence to vicious forms, and of those determined prejudices which the very situation of Judge is apt to generate. A judge, whose business it is to deal with human nature in its worst forms, having daily before his eyes the false pretences and mendacity to which the guilty have recourse, perpetually contriving expedients for unvailing imposture, gradually ceases to believe in the innocence of those accused, and by anticipation expects to find a criminal using all his arts to deceive him. That it is the character of all judges to be actuated by these prejudices, I am far from thinking; but when the propriety of arming men with the power of inflicting the punishment of death is the question under consideration, it ought not to be forgotten, before putting into their hands the fatal weapon, that they are not exempted from the weaknesses of humanity; that their wisdom is not increased, neither are they rendered infallible, by thus arming them.

The danger attending the use of capital punishment appears in a more striking point of view when we reflect on the use that may be made of it by men in power, to gratify their passions, by means of a judge easily intimidated or corrupted. In such cases, the iniquity covered with the robe of justice may escape, if not all suspicion, at least the possibility of proof. Capital punishment, too, affords to the prosecutor as well as to the judge, an advantage that in all other modes is wanting—I mean greater security against detection—by stifling by death all danger of discovery arising from the delinquent, at least: while he lives, to whatever state of misery he may be reduced, the oppressed may meet with some fortunate event by which his innocence may be proved, and he may become his own avenger. A judicial assassination, justified in the eyes of the public by a false accusation, with almost complete certainty assures the triumph of those who have been guilty of it. In a crime of an inferior degree, they would have had everything to fear; but the death of the victim seals their security.

If we reflect on those very unfrequent occurrences, but which may at any time recur—those periods at which the government degenerates into anarchy and tyranny, we shall find that the punishment of death, established by law, is a weapon ready prepared, which is more susceptible of abuse than any other mode of punishment. A tyrannical government, it is true, may always re-establish this mode of punishment after it has been abolished by the legislature. But the introducing what would then become an innovation, would not be unattended with difficulty: the violence of which it was to be the precursor would be too much exposed, the tocsin would be sounded. Tyranny is much more at its ease when exercised under the sanction of law, when there is no appearance of any departure from the ordinary course of justice, and when it finds the minds of people already reconciled and accustomed to this mode of punishment. The Duke of Alba, ferocious as he was, would not have dared to sacrifice so many thousand victims in the Low Countries, if it had not been a commonly received opinion that heresy was a crime which merited the punishment of death. Biren, not less cruel than the Duke of Alba — Biren, who peopled the deserts of Siberia with exiles, caused them previously to be mutilated, that being the most severe punishment that was in use in that country — he very rarely ventured to punish them capitally, because capital punishment was not in use: so little do even the most arbitrary despots dare to violate established customs. Hence we may draw a strong reason for seizing upon periods of tranquillity for destroying these dangerous instruments, which, though no longer dreaded when covered with rust, are with such facility brought into use again, when passion invites their employment.

The objection arising from the irremissibility of the punishment of death applies to all cases, and can be removed only by its complete abolition. Upon this occasion it is necessary to bear in mind that there are two branches of security, for each of which it is necessary to make provision. Security against the errors and corruptions in judicial procedure, and security against crimes. If the latter were not to be attained but at the expense of the former, there would be no room for hesitation. With respect to crimes, from whom is it that the terror is felt? From every person that is capable of committing a crime; that is to say, from all men, and at all times. With respect to the errors and corruptions of justice, these are the exceptions, the accidental and rare occurrences.

This punishment is far from being popular; and it becomes less and less so every day, in proportion as mankind become more enlightened, and their manners more softened. The people flock in crowds to an execution; but this eagerness, which at first might appear so disgraceful to humanity, does not proceed from the pleasure expected from the sight of men in the agonies of death: it arises from the pleasure of having the passions strongly excited by a tragic scene. There is, however, one case in which it does seem to be popular, and that in a very high degree; I mean the case of murder. The attachment seems to be grounded partly on the fondness for analogy, partly on the principle of vengeance, and partly, perhaps, by the fear which the character of the criminal is apt to inspire. Blood, it is said, will have blood, and the imagination is flattered with the notion of the similarity of the suffering, produced by the punishment, with that inflicted by the criminal.

In other cases, the punishment of death is unpopular; and this unpopularity produces different dispositions, all equally contrary to the ends of justice: a disposition on the part of the individuals injured not to prosecute the offenders, for fear of bringing them to the scaffold; a disposition on the part of the public to favour their escape; a disposition on the part of the witnesses to withhold their testimony, or to weaken its effect; a disposition on the part of the judges to allow of a merciful prevarication in favour of the accused; and all these anti-legal dispositions render the execution of the laws uncertain, without referring to that loss of respect which follows upon its being considered meritorious to prevent their execution.

§ 3. *Recapitulation and Comparison of the Punishment of Death, with those Punishments which may be substituted for it.*

The punishment of death, it has been observed, possesses four desirable properties:—

1. It is in one case analogous to the offence.
2. In that same case it is popular.
3. It is in the highest degree efficacious in preventing further mischief from the same source.
4. It is exemplary, producing a more lively impression than any other mode of punishment.

The two first of these properties exist in the case of capital punishment when applied to murder; and with reference to that species of offence alone, are they sufficient reasons for persevering in its use? Certainly not: each of them, separately considered, is of very little importance. Analogy is a very good recommendation, but not a good justification. If in other respects any particular mode of punishment be eligible, analogy is an additional advantage: if in other respects it be ineligible, analogy alone is not a sufficient recommendation: the value of this property amounts to very little, because, even in the case of murder, other punishments may be devised, the analogy of which will be sufficiently striking.

In respect also of *popularity*, the same observations apply to this mode of punishment. Every other mode of punishment that is seen to be equally or more efficacious will become equally or more popular. The approbation of the multitude will naturally be in proportion to the efficacy of the punishment.

The third reason, that it is efficacious *in preventing further mischief from the same source*, is somewhat more specious, but not better founded. It has been asserted, that in the crime of murder it is absolutely *necessary;* that there is no other means of averting the danger threatened from that class of malefactors. This assertion is, however, extremely exaggerated: its groundlessness may be seen in the case of the most dangerous species of homicide—assassination for lucre, a crime proceeding from a disposition which puts indiscriminately the life of every man into immediate jeopardy. Even these malefactors are not so dangerous nor so difficult to manage as madmen; because the former will commit homicide only at the time that there is something to be gained by it, and that it can be perpetrated with a probability of safety. The mischief to be apprehended from madmen is not narrowed by either of these circumstances. Yet it is never thought necessary that madmen should be put to death. They are not put to death: they are only kept in confinement; and that confinement is found effectually to answer the purpose.

In fine, I can see but one case in which it can be necessary, and that only occasionally. In the case alleged for this purpose by M. Beccaria—the case of rebellion, or other offence against government of a rebellious ten-

dency, when by destroying the chief you may destroy the faction, where discontent has spread itself widely through a community, it may happen that imprisonment will not answer the purpose of safe custody. The keepers may be won over to the insurgent party, or if not won over, they may be overpowered. They may be won over by considerations of a conscientious nature, which is a danger almost peculiar to this case; or they may be won over by considerations of a lucrative nature, which danger is greater in this case than in any other, since party projects may be carried on by a common purse.

What, however, ought not to be lost sight of in the case of offences of a political nature is, that if by the punishment of death one dangerous enemy is exterminated, the consequence of it may be the making an opening for a more formidable successor. "Look," said the executioner, to an aged Irishman, showing him the bleeding head of a man just executed for rebellion — "look at the head of your son." "My son," replied he, "has more than one head." It would be well for the legislator, before he appoints capital punishment, even in this case, to reflect on this instructive lesson.

The fourth reason is the strongest. The punishment of death is exemplary, pre-eminently exemplary: no other punishment makes so strong an impression.

This assertion, as has been already noticed, is true with respect to the majority of mankind: it is not true with respect to the greatest criminals.

It appears, however, to me, that the contemplation of perpetual imprisonment, accompanied with hard labour and occasional solitary confinement, would produce a deeper impression on the minds of persons in whom it is more eminently desirable that that impression should be produced, than even death itself. We have already observed, that to them life does not offer the same attractions as it does to persons of innocent and industrious habits. Their very profession leads them continually to put their existence in jeopardy; and intemperance, which is almost natural to them, inflames their brutal and uncalculating courage. All the circumstances that render death less formidable to them, render laborious restraint proportionably more irksome. The more their habitual state of existence is independent, wandering, and hostile to steady and laborious industry, the more they will be terrified by a state of passive submission and of laborious confinement, a mode of life in the highest degree repugnant to their natural inclinations.

Giving to each of these circumstances its due weight, the result appears to be, that the prodigal use made by legislators of the punishment of death has been occasioned more by erroneous judgments [arising from the situation in which they are placed with respect to the other classes of the community] than from any blameable cause. Those who make laws belong to the highest classes of the community, among whom death is considered as a great evil, and an ignominious death as the greatest of evils. Let it be confined to that class, if it were practicable, the effect aimed at might be produced; but it shows a total want of judgment and reflection to apply it to a degraded and wretched class of men, who do not set the same value upon life, to whom indigence and hard labour is more formidable than death, and the habitual infamy of whose lives renders them insensible to the infamy of the punishment.

If, in spite of these reasons, which appear to be conclusive, it be determined to preserve the punishment of death, in consideration of the effects it produces *in terrorum*, it ought to be confined to offences which in the highest degree shock the public feeling — for murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers; and in these cases, expedients, by which it may be made to assume the most tragic appearance, may be safely resorted to, in the greatest extent possible, without having recourse to complicated torments.

§ 4. *Collateral evil effects of the frequent use of the Punishment of Death.*

The punishment of death, when applied to the punishment of offences in opposition to public opinion, far from preventing offences, tends to increase them by the hope of impunity. This proposition may appear paradoxical; but the paradox vanishes when we consider the different effects produced by the unpopularity of the punishment of death. In the first place, it relaxes prosecution in criminal matters; and in the next place, foments three vicious principles: — 1. It makes perjury appear meritorious, by founding it on humanity; 2. It produces contempt for the laws, by rendering it notorious that they are not executed; 3. It renders convictions arbitrary, and pardons necessary.

The relaxation of criminal procedure results from a series of transgressions on the part of the different public functionaries, whose concurrence is necessary to the execution of the laws: each one alters the part allotted to him, that he may weaken or break the legal chain by which he is bound, and substitute his own will for that of the legislator;* but all these causes of uncertainty in criminal procedure are so many encouragements to malefactors.

* "Observe that juryman in a blue coat," said one of the Judges at the Old Bailey to Judge Nares; "do you see him?" "Yes."

BOOK III.

OF PRIVATIVE PUNISHMENTS, OR FORFEITURES.

CHAPTER I.

PUNISHMENT ANALYZED.

We now come to the last of the two grand divisions of Punishments—*Privative Punishments*, or *Forfeitures*.

The word forfeiture is never used but with reference to some *possession*.*

Possessions are either substantial or ideal: substantial, when it is the object of a real entity (as a house, a field;) ideal, when it is the object of a fictitious entity (as an office, a dignity, a right.)

The difficulty of dealing with cases of this description will immediately be seen. Real entities have all a common genus, to wit, *substance*. Fictitious entities have no such common genus, and can only be brought into method in virtue of the relation they bear to real objects.

Possessions, of whatsoever nature they be, whether real or fictitious, are *valuable;* and to forfeit them can never otherwise be a punishment, than as far as they are instruments of pleasure or security. By specifying, then, the sort of persons or things from which the benefit said to belong to a fictitious possession is actually derived, all will be done that can be done towards giving a methodical view of those possessions, and of the penal consequences of forfeiting them.†

To investigate, therefore, the several kinds of proper forfeitures, it is necessary to investigate the several kinds of possessions. On this subject, however, as it comes in only collaterally on the present occasion, it will not be necessary to insist very minutely.

Possessions are derived either from things only, or from persons only; or from both together. Those of the two first sorts may be styled simple possessions; those of the other, complex.

Possessions derived from things may consist either—1. in money: these may be called pecuniary; 2. in other objects at large. The former may be styled pecuniary; the latter quasi-pecuniary. Accordingly, forfeiture of money may be styled pecuniary forfeiture: forfeiture of any other possession derived from things, quasi-pecuniary. Quasi-pecuniary forfeitures are capable of a variety of divisions and subdivisions; but as these distinctions turn upon circumstances that make no difference in the mode of punishment, it will not be necessary, on the present occasion, to enter into any such detail.

Possessions derived from persons, consist in the *services* rendered by those persons. Services may be distinguished into *exigible* and *inexigible*. By exigible, I mean such as a man may be punished (to wit, by the political sanction) for not rendering: by inexigible, such as a man cannot be punished for not rendering; or, if at all, not by any other sanction than either the moral or the religious.‡ The faculty of procuring such as are exigible is commonly called *power*, to wit, power over persons: the faculty or chance of procuring such as are inexigible depends, in great measure, upon *reputation;* hence re-

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"Well, there will be no conviction of death to-day." And the observation was confirmed by the fact.

* As all our ideas are derived ultimately from the senses, almost all the names we have for intellectual ideas seem to be derived ultimately from the names of such objects as afford sensible ideas; that is, of objects that belong to one or other of the three classes of real entities; insomuch that, whether we perceive it or no, we can scarce express ourselves on any occasion but in metaphors. A most important discovery this in the metaphysical part of grammar, for which we seem to be indebted to M. d'Alembert.—See his *Mélanges*, tom. i. *Disc. Prelim. &c.*

The way in which the import of the word forfeiture is connected with sensible ideas seems to be as follows: the words *to forfeit* come either immediately, or through the medium of the old French, from the modern Latin word *forisfacere*. *Foris* means out of doors, or out of the house; *facere*, is to make or to cause to be. The conceit then is, that when any object is in a man's possession, it is as it were within doors—within his house: any act, therefore, which, in consequence of some operation of the law, has the effect of causing the object to be no longer in his possession, has the effect of causing it, as it were, to be out of his doors, and no longer within his house.

† Forfeiture is, in some cases, though rarely, applied to corporal punishments. Thus capital punishment is called forfeiture of life; mutilation, forfeiture of limbs or members. It is also, with the addition of the word liberty, applied to corporal punishments of the restrictive classes, as in the case of imprisonment and quasi imprisonment. The other modes of confinement require further additions to be made to them: as, to express *foreign* banishment, forfeiture of the liberty of residing in any part of the dominions of the state; to express *domestic* banishment, forfeiture of the liberty of being any longer in the place of his abode. The infinite variety of specific restraints may also be expressed by the phrase of forfeiture of liberty, with so many different additions: forfeiture of the liberty of exercising such or such an operation, forfeiture of the liberty of pleading, &c.

‡ To services inexigible, but by the force of these auxiliary sanctions, correspond what are called imperfect rights. Whatever right a man may have to a service, which the party is not punishable by law for not rendering him, is what is called, by writers on the pretended law of nature, an imperfect right: and the obligation to render any such service, an imperfect obligation.

sult two farther kinds of forfeiture: forfeiture of power and forfeiture of reputation.*

Reputation may be distinguished into natural and factitious: by factitious, I mean that which is conferred by rank or dignity.

Credibility is a particular species of reputation — the reputation of veracity. Hence we have two further kinds of forfeiture, both subordinate to that of reputation: forfeiture of rank or dignity, and forfeiture of credibility.

As to complex possessions, and the forfeitures that relate to them, these are too heterogeneous to be arranged in any systematic method: all that can be done is to enumerate them. Thus much only may be said of them in general, that the ingredients of each of them are derived from both the classes of objects which we have mentioned as being the sources from which the several kinds of simple forfeitures are derived.

It should seem, however, that they might all of them, without any great violence, be brought under the title of *conditions*. Conditions, then, may, in the first place, be distinguished into *ordinary* and *peculiar*.

Ordinary conditions or modes of relationship may be distinguished into *natural* and *acquired*. By natural conditions, I mean those which necessarily belong to a man by birth; to wit, in virtue of either his own birth or that of some other person to whom he stands related; such as that of son, daughter, father, mother, brother, sister, and so on, through the several modes of relationship, constituted by the several degrees of consanguinity. To stand in any of these relations to such or such a person may be the source of various advantages. These conditions, it is plain, cannot themselves be forfeited; a man, however, may, and in some instances has been said to have forfeited them, and may actually be made to forfeit many of the advantages attending them.

Acquired conditions may be distinguished, in the first place, into *political* and *religious;* and political again into *domestic* and *public*. Domestic conditions may be distinguished into *family* conditions and *professional*. Family conditions are — 1*st*, The matrimonial; or that of being husband or wife to such a person; 3*d* and 4*th*, that of being guardian or ward; 5*th* and 6*th*, that of being master or servant to such a person.

By public political condition, I mean that of belonging to any voluntary society of men instituted on any other than a religious account.

By religious condition, I mean that of belonging to any society or sect instituted for the sake of joining in the performance of religious ceremonies.

Of conditions that may be termed peculiar, the several sorts may, it should seem, be all comprised under the head of conditions constituted, either 1*st*, by offices; or 2*dly*, by corporation privileges. A right of exercising an office is an exclusive right to render certain services.

Conditions constituted by offices may be ranked in the number of complex possessions, inasmuch as they are apt to include the three simple possessions following; to wit, a certain share of power, a certain rank, and a certain salary, or fees or other emoluments coming under the head of pecuniary or quasi-pecuniary possessions.

Of offices there is an almost infinite variety of kinds, and a still greater variety of names, according to the almost infinite modifications of rank and power in different countries, and under different governments. This head is, consequently, susceptible of a great variety of divisions and subdivisions; but these it will not be necessary, on the present occasion, to consider.

Corporations may be distinguished into political and religious. Under the head of religious corporations may be included the various monastic orders established in countries professing the Roman Catholic religion.

As to political corporations, the catalogue of the possessions that may be annexed to the condition of one who is a member of those bodies is so various, that no other account need, on the present occasion, or indeed can be given of it, than that there are scarce any of the simple possessions above enumerated, but may be included in it.†

To the condition of one who is a member of a religious order or corporation, may be annexed, besides the above possessions, others, the value whereof consists in such or such a chance as they may appear to confer of enjoying the pleasures of a future life, over and above such chance of enjoying the same pleasures as appears to be conferred by the condition or privilege of being an ordinary professor of the same religion.

As an appendix to the above list of possessions, may be added two particular kinds of possessions, constituted by the circumstance of contingency, as applied in different ways to each one in that list. These are, the legal capacity of acquiring, as applied to those articles respectively, and the protection of the law, whereby a man is secured against the

* Of services that are altogether inexigible, such as are strictly spontaneous, gratuitous, depend altogether upon good-will: upon the good-will of the party rendering them to the party to whom they are rendered. This good-will depends, in great measure, upon the reputation of the party to whom they are rendered.

† A share beneficial or fiduciary in the use of such a quantity of money, of such an estate in land: a share in such an office of power or trust: an exemption from such a tax or other public burthen: the exclusive privilege of such or such an occupation.

chance of losing them, if acquired. These abstract kinds of possessions form the subject of so many kinds of forfeiture: forfeiture of legal capacity and forfeiture of the protection of the law: forfeiture of legal capacity with respect to any possession, taking away from a man whatever chance he might have of acquiring it; forfeiture of protection, subjecting him to a particular chance of losing it.*

CHAPTER II.

OF THE PUNISHMENTS BELONGING TO THE MORAL SANCTION.

Punishments of this class admit of no distinctions; and this, however paradoxical it may seem, from no other reason than their extreme variety. The way in which a man suffers, who is punished by the moral sanction, is by losing a part of that share which he would otherwise possess of the esteem or *love* of such members of the community as the several incidents of his life may lead him to have to do with. Now, it is either from the esteem they entertain for him, or the love they bear him, or both, that their *good-will* towards him, in a great measure, depends: moreover, the way in which this good-will displays itself, is by disposing the person who entertains such affection, to render good offices, and to forbear doing ill offices (or in other words, to render *inexigible services*) to the party towards whom it is entertained; the way in which the opposite affection, *ill-will*, displays itself, is accordingly by disposing the former to forbear doing good offices, and if it has risen to a certain degree, by disposing him to render ill offices, as far as may be consistent with his own safety, to the latter.

Now then, from the good offices of one man to another, may all sorts of possessions, and through them, or even more immediately, all sorts of pleasures, be derived. On the other hand, from the withholding of the good offices one man might have expected from another, may all sorts of pains, and death itself, be also derived; much more may they from positive ill offices added to those other negative ones. And what are the good offices which you may be disposed to withhold from me, or the ill offices you may be disposed to do me, from my having become the object of your ill-will? It is plain, not one or other particular species of good or ill office, but any species whatever, just as occasion serves, that shall be proportionate to the strength of your ill-will, and consistent with your own safety. This consideration will make our work short, under the head which respects the several modes or species of punishment subordinate to the mode in question.

The same consideration will make it equally short under the second head, relative to the evils producible by the mode or modes of punishment in question. These, it must have been already seen, may be all sorts of evils: all the different sorts of evils which are producible by any of the punishments belonging to the political sanction; by any punishments properly so called: in a word, all the different sorts of evils to which human nature is liable.

But though the punishments belonging to the moral sanction admit not of any varieties that are separable from one another, there are two distinct parcels, as it were, into which the evils produced by any lot of punishment issuing from this source, on the occasion of any offence, may be divided. One (which, as being the basis of the other, may be mentioned first, though the last in point of time) consists of the several contingent evils that may happen to the offender in consequence of the ill-will he has incurred; the other consists of the immediate pain or anxiety, the painful sense of shame, which is grounded on the confused apprehension of the unliquidated assemblage of evils above mentioned. It is this last which is referable in a peculiar manner to the moral sanction, and which cannot be produced by the political, any otherwise than as far as those who have the management of that sanction can gain an influence over the moral: it may, therefore, for distinction sake, be styled the *characteristic evil* of the moral sanction. This must obtain, in a greater or less degree, upon every instance of detected delinquency, unless in those callous and brutish natures, if any such there be, in whom all sense of disgrace, and all foresight of the consequences, is utterly extinguished. The others above spoken of may be styled the casual evils.

These casual evils (as we have already intimated,) owing to their extreme uncertainty, admit not of any determinate variations in point of *quality*: in point of *quantity*, however, they do admit of some distinctions, resulting from — 1*st*, their *Intensity*; 2*dly*, their *Extent*. This distinction ought not to be overlooked, since we shall have occasion to make frequent application of it to practice.

These two lots of evils, howsoever distinguishable, intermix with and aggravate one another. I have done an immoral act: I am discovered: I perceive as much. Now then, before I happen to have occasion to avail myself of the good offices of such of my acquaintance as come to know of it — before I happen to be in a way to suffer from the denial of those good offices — in a word,

* Forfeiture of protection may be considered also, in another point of view, as being the forfeiture of the services of such ministers of justice, whose office it is to afford a man protection in the enjoyment of the possession in question.

before I have experienced any of the *casual* evils annexed by the moral sanction to my delinquency, I already foresee more or less clearly, and apprehend more or less strongly, the loss of those good offices and of that good-will: I feel the painful sense of shame, the pain of ignominy; I experience, in a word, the *characteristic* evil of the moral sanction as the punishment of my misbehaviour. This sense of shame stamps the marks of guilt upon my deportment. This being the case, either out of despair I avoid my acquaintance, or else I put myself in their way. If I avoid them, I by that means already deprive myself of their good offices: if I put myself in their way, the guilt which is legible in my countenance, advertises and increases their aversion: they either give an express denial to my request, or, what is more common, anticipate it by the coldness of their behaviour. This reception gives fresh keenness to the sting of shame, or (in the systematical language I have ventured to make use of,) the experiment I have made of the *casual* evils adds force to the *characteristic* evils of this sanction.

We have already intimated the distinction between positive and negative ill offices: to the former, and even in a few instances to the latter, it is the duty, and a great part of the business, of the political magistrate to set limits. These limits, however, may come accidentally to be transgressed, as there are scarce any laws that can be made but what may come accidentally to be disobeyed. On this account, the evils that may result from this source remain still indeterminate and unlimited. But were the laws that might be made in this behalf ever so certain in their operation, those evils would still remain indeterminate and unlimited, notwithstanding. For so uncertain and unforeseeable may be the connexion between the refusal of a good office, and the miseries which in particular circumstances may be the consequences of such a refusal, that no law could make a secure provision against those miseries in every case, without such a subversion of all liberty and all property as would produce much greater miseries. Your giving me a shilling to buy me food, or taking me twenty miles to a physician, may, on a critical occasion, save me from an excruciating disease; but no law, without leaving it to the determination of the person in want, can with sufficient certainty describe such occasions; nor can any law, without depriving you of all liberty and all property, oblige you to give money to, or take a journey for, every man who shall determine himself to be in want of such assistance.

Howosever this be with regard to negative ill offices, positive ill offices not only may be limited, but in most cases may be, and commonly are, forbidden. In no settled state of government is private displeasure permitted to rise so high as to vent itself indiscriminately in any of those direct ways of inflicting pain which the political magistrate himself may have thought it expedient to recur to. However flagrantly immoral may have been the conduct of a delinquent, persons at large are never permitted, of their own authority, to punish him by beating or maiming, or putting him to death. Positive ill offices may be divided into such as display themselves in actions at large, and such as display themselves in discourse. Now, it is to speech that the latitude which is still left to the right of rendering positive ill offices in a *direct* way, is principally confined:* and even this right is commonly subject to a number of limitations. But ill offices which are confined to speech, are not, if they stop there, productive of any evil. When they are, it is ultimately by disposing other persons to entertain a displeasure against the same person, and manifest it by actions of another kind. If, then, such positive ill offices as display themselves in actions at large be excluded, all that remains is resolvable ultimately into *negative* ill offices. And of these, those which a delinquent has in ordinary cases to apprehend, amount only to such as are not *illegal*.

Nor is even this a contemptible and inconsiderable source of suffering. Dependent as men in a state of society are upon one another, the punishment derived from the source in question, even when narrowed by all these restrictions, may, and indeed frequently does, rise to a tremendous height. It admits of no evasion: it comes upon a man from all quarters: he can see no end to its duration, nor limit to its effects. It is not unusual for it to bereave him of the chief pleasures and sources of profit he has set his heart upon: it may deprive him of all those profits and enjoyments he had been accustomed to expect at the hands of his friend or his patron: by setting his common acquaintance at a distance from him, it may fill the detail of his life with a perpetual train of disappointments and rebuffs. It leaves him joyless and forlorn: and, by drying up the source of every felicity, it embitters the whole current of his life.

Were we indeed to inquire minutely into the distinction between the nature of the political and moral sanctions, it would come out that, of the evils which, when considered as issuing from the moral sanction, I have styled *casual* evils, some are even more *likely*

* I am conscious that the distinction here stated, between the direct and indirect way of rendering ill offices, is far enough from being explicit; but there would be no way of making it so without despatching a large and intricate title of the doctrine of offences.

to be brought upon a man by the action of one of these sanctions, and some others by that of the other. But as to the species of evil, this is all the distinction we shall be able to make out; for there is not any evil which the exertion of one of these forces may bring upon a man, but which may also be brought upon him by the action of the other.

The most studied and artificial torments, for instance, that can be invented by a political magistrate, and the most unlikely for a man to be exposed to suffer by the unassisted powers of nature, or even from the unauthorized resentment of an individual, are what he may by accident be exposed to from the latter source. It may be for want of some evidence that an individual might furnish, and from ill-will forbears to furnish, that I may have been doomed to these torments by a judge; or if the like torments be supposed to be inflicted by the unauthorized violence of an enemy, they may be attributed in the first place, indeed, to the vengeance of that enemy; but in the second place, to the disesteem and ill-will borne me by some stranger, who having it in his power to rescue me, yet exasperated against me on account of some real or supposed instance of immorality in my behaviour, chose rather to see me suffer than to be at the pains of affording me his assistance.

On the other hand, the whole sum of the evils depending upon the moral sanction, to wit, not only the casual evils, but the sense of infamy which constitutes the characteristic evil, is liable in many instances to be brought upon a man by the doom of the political magistrate. This is what we have found it unavoidably necessary, on various occasions, to give intimation of, and what we shall have need more particularly to enlarge upon hereafter.

It is in the *manner*, then, in which the evils that come alike under the department of each of the two sanctions come to be inflicted, that the only characteristic difference discernible between these two sanctions is to be seen. With regard to punishment issuing from the political sanction, the species, the degree, the time, the place, the person who is to apply it, are all assignable. With regard to that which may issue from the moral sanction, none of these particulars are assignable.

When I say assignable, I must be understood to speak with reference to some particular time, coincident with or subsequent to that of the commission of the offence. At that very time, then, with respect to political punishment, that is, with respect to personal punishments and forfeitures, many of those particulars, and sometimes all of them, are assignable, and may be foreseen. At the time the offence (theft suppose) is committing, it may be foreseen that a number of stripes given with such an instrument, not more than so many, nor fewer than so many, will be inflicted (in case of detection) so many days or weeks hence, at such a place and by the hands of such an executioner: and *vice versâ*, when they come to be inflicted, the punishment will be seen to be the consequence of such an offence. Now, when the organical pain produced by the punishment thus inflicted is over, all the punishment for that offence, as far as depends upon the political sanction, is commonly over and at an end. But as to the ill offices, as well negative as positive, which constitute the substance and groundwork of the moral sanction, no man can tell what they will be—what particular evils they will subject a man to—when they will commence, or when they will end—where they will display themselves, nor who will render them. Nor, *vice versâ*, when they have actually been rendered, when such or such a neighbour has shut his door against me, and I am pining with hunger or shivering with cold, can I always know for certain that the immorality I was guilty of at such or such a time was the occasion of his unkindness. In a word, *determinateness* is the perfection of the punishments belonging to the political sanction: *in*determinateness is the very essence of those issuing from the moral.

A word or two may be of use in this place with respect to the nomenclature employed in speaking of the punishments belonging to this sanction. The expressions made use of on this occasion are singularly various: a whole legion of fictitious entities are created, for the purpose of representing the one fundamental idea in question, under the different aspects of which it is susceptible. The names of these fictitious entities are many of them disparate: they require different sets of words to enable them to make a meaning; and the coincidence lies not between the import of these names when separately taken, but between certain sentences or propositions, in which they may respectively be made to bear a part. Among these words may be reckoned reputation, honour, character, good name, dishonour, shame, infamy, ignominy, disgrace, aversion, and contempt. In speaking, then, of a man as suffering under a punishment of the moral sanction, it may be more or less convenient, according to the occasion, to use, amongst others, any of the following expressions: We may say that he has forfeited his reputation, his honour, his character, his good name; that his fame has been tarnished; that his honour, his character, or his reputation, has received a stain; that he stands disgraced; that he has become infamous; that he has sunk under a load of

infamy, ignominy, or disgrace; that he has fallen into disgrace, into disesteem, into disrepute; that he has incurred the ill-will, the aversion, the contempt of the neighbourhood, of the public; that he is become an object of aversion or contempt. It were the task rather of the lexicographer than the jurist to exhaust the catalogue of these expressions. Those which have been already exhibited may be sufficient to advertise the reader of the similarity there may be in point of sense between a variety of other expressions of like import, however dissimilar they may be in sound.

Hitherto we have considered the punishment belonging to the moral sanction in no other point of view than that in which it appears when standing singly, uncombined with and uninfluenced by the political. In this state, the direction given to it, and the force with which it acts, are determined altogether by the persons to whom it belongs ultimately to dispense it, unassisted and uncontrouled by the political magistrate. In this state it acted before the formation of political society, before the creation of that artificial body of which the political magistrate is the head. In this state, by its connexion with the various modes of conduct which it happened to be employed to prohibit or to recommend, it gave birth to that fictitious set of rules which are what some moralists have sometimes at least in view, when they speak of the *law of nature*. In this state it was an engine, to the power of which the political magistrate was a witness, before the construction of that which is of his own immediate workmanship. It then was, it still is, and it ever must be, an engine of great power, in whatever direction it be applied; whether it be applied to counteract or to promote his measures. No wonder, then, he should have sought by various contrivances to press it into his service. When thus fitted up and set to work by the political magistrate, it becomes a part of the vast system of machinery to which we have given the name of the political sanction. And now, then, we are in a condition to discuss the nature of that genus of political punishment which, in systems of jurisprudence, is commonly spoken of under the name of infamy, or forfeiture of reputation.

§ 2. *Advantages and Disadvantages of the Punishments belonging to the Moral Sanction.*

We will now proceed to examine the punishments belonging to the moral sanction itself, independently of any employment of it by the magistrate to aggravate or guide the effect of his designs.

Punishments of this class, as has been already said, admit of no distinctions: they comprise all sorts of evils: the ill-will produced manifests itself in a variety of modes, that can neither be calculated nor foreseen. They admit, then, of no precise description; for it is only when the effects are determinate, that a punishment admits of a description. Will they be analogous to the offence, or unfrugal, or excessive? Upon these points nothing can be said.

Our observations will be comprised under three heads: — their divisibility, equability, and exemplarity.

1. These punishments admit of minute division: they have all the degrees possible from mere blame to infamy, from a temporary suspension of good-will, to active and permanent ill-will: but these several degrees depend altogether upon accidental circumstances, and are incapable of being estimated by anticipation. Punishments of the pecuniary or chronical class, as, for example, imprisonment, are susceptible of being exactly measured: punishments that depend on the moral sanction, not. Before they are experienced, the value put upon them is necessarily extremely inaccurate. In respect of intensity, they are liable to be inferior to the greater part of those belonging to the political sanction: they consist more in privations of pleasure, than in positive evils. This it is that constitutes their principal imperfection; and it is solely for supplying this imperfection, that penal laws were established.

One of the circumstances by which their effect is weakened, is the *locality* of their operation. Do you find yourself exposed to the contempt of the people with whom you are in the habit of associating? to exempt yourself from it, all that you have to do is to change your abode. The punishment is reduced to the giving a man the option to remain exposed to the inconveniences resulting from this contempt, or to inflict on himself the punishment of banishment, which may not be perpetual. He does not abandon the hope of returning, when by lapse of time the memory of his transgressions shall be effaced, and the public resentment appeased.

2. In respect of *equability*, these punishments are really more defective than at first sight they might appear. In every condition in life, each man has his own circle of friends and acquaintance: to become an object of contempt or aversion to this society is a misfortune as great to one man as to another. This is the result that may at first view present itself to the mind, and which, to a certain extent, is really correct; it will, however, upon a more narrow scrutiny of the matter, be found, that in point of intensity this class of punishment is subject to extreme variation, depending, as it does, upon the condition in life, wealth, education, age, sex, and other circumstances: the casual evils resulting from

the punishments belonging to this sanction are infinitely variable: shame depends upon sensibility.

Women, especially among civilized nations, are more alive to, and susceptible of, the impression of shame than men. From their earliest infancy, and even before they are capable of understanding the object of it, one of the most important branches of their education is, to instil into them principles of modesty and reserve; and they are not long in discovering that this guardian of their virtue is at the same time the source of their power. They are, moreover, physically weaker, and more dependent than men, and stand more in need of protection; it is more difficult for them to change their society, and to remove from the place of their abode.

At a very early age, generally speaking, sensibility to the moral sanction is not remarkably acute: in old age it becomes still more obtuse. Avarice, the only passion that is fortified by age, subdues all sense of shame.

A weak state of health, morbid irritability, any bodily defect, any natural or accidental infirmity, are circumstances that aggravate the suffering from shame, as from every other calamity.

Wealth, considered of itself, independently of rank and education, has a tendency to blunt the force of these impressions. A rich man has it in his power to change his residence; to procure fresh connexions and acquaintance, and by the help of money to purchase pleasures for which other people are dependent upon good-will. There exists a disposition to respect opulence on its own account; to bestow on the possessor of it gratuitous services, and, above all, external professions of politeness and respect.

Rank is a circumstance that augments the sensibility to all impressions that affect the honour; but the rules of honour and morality are not always calculated upon the same scale: the higher ranks are, however, in general, more alive to the influence of opinion than the inferior classes.

Profession and habitual occupation materially affect the punishments proceeding from this source. In some classes of society, the point of honour is at the very highest pitch, and any circumstance by which it is affected produces a more acute impression than any other species of shame. Courage, among military men, is an indispensable qualification: the slightest suspicion of cowardice exposes them to perpetual insults: thence, upon this point, that delicacy of feeling among men who, upon other points, are in a remarkable degree regardless of the influence of the moral sanction.

The middle ranks of society are the most virtuous: it is among them that in the greatest number of points the principles of honour coincide with the principles of utility: it is in this class also that the inconveniences arising from the forfeiture of esteem are most sensibly felt, and that the evil consequences arising from the loss of reputation produce the most serious ill consequences.

Among the poorer classes, among men who live by their daily labour, sensibility to honour is in general less acute. A day labourer, if he be industrious, though his character be not unspotted, will be at no loss for work. His companions are companions of labour, not of pleasure: from their gratuitous services he has little to expect, and as little to ask. His wants are confined to the mere necessaries of life. His wife and his children owe him obedience, and dare not withhold it. The pleasures which arise from the exercise of domestic authority fill up the short intervals of labour.

3. The greatest imperfection attending punishments arising from the moral sanction, is their want of *exemplarity*. Their effect, in this respect, is less than that of any of the punishments of the political sanction. When a man is exposed to suffering from loss of reputation, it may be unknown to all the world, or at least the knowledge may be confined to those who are the instruments of his punishment, and to the immediate circle of his friends and acquaintance. But these are witnesses only of a small part of his sufferings. They perceive that he is treated with indifference or disdain; they observe that he does not find protection or confidence: but all these observations are transitory. The individual, wounded by these signs of coldness or aversion, shuns the company of the authors or the witnesses of his shame; he retires to solitude, where he suffers in secret; and the more unhappy he is, the smaller is the number of the spectators of his punishment.

Punishments, connected with the moral sanction, are advantageous with reference to *reformation*. When a man suffers in consequence of a violation of the established rules of morality, he can only refer the evil he experiences to its true cause: the more sensible he is to shame, the more he will fear to increase it: he will become either more prudent that he may avoid detection, or more careful to save appearances; or he will in future submit to those laws which he has been unable to break without suffering. Public opinion, with the exception of a few cases, is not implacable. There is among men a reciprocal need of indulgence, and a levity and ease in forgetting instead of forgiving faults, when the remembrance of them is not renewed by fresh failures.

On the other hand, with respect to dishonourable actions for which there is neither appeal or pardon, the punishment of infamy acts as a discouragement, and not as a mo-

tive to reformation. *Nemo dignitate perditæ parcit.*

These disadvantages are in a measure compensated, and this sanction receives a degree of force which is often wanting in the political sanction, from the *certainty* of its action. There is no offending against it with impunity: an offence against one of the laws of honour, arouses all its guardians. The political tribunals are subjected to a regular process: they cannot pronounce a decision without proof, and proofs are often defective. The tribunal of public opinion possesses more liberty and more power: it is liable to be unjust in its decisions, but they are never delayed on that account; they can be reversed at pleasure. Trial and execution proceed with equal steps, without delay or necessity for pursuit. There are everywhere persons ready to judge, and to execute the judgment. This tribunal always inclines to the side of severity: its judges are interested by their vanity and their love of display in making its decisions severe; the more severe they appear, the more they flatter themselves with the possession of the good esteem of others. They seem to think that the spoliation of one character forms the riches of another. Thus, although the punishments of the moral sanction are indeterminate, and for the most part, when estimated separately, of little weight, yet by the certainty of their operation, their frequent recurrence, and their accumulation, from the number of those who have authority to inflict them, they possess a degree of force which cannot be despised by any individual, whatever may be his character, his condition, or his power.

The power exercised by the moral sanction varies according to the degree of civilization.

In civilized society there are many sources of enjoyment, and consequently many wants, which can be supplied only from considerations of reciprocal esteem: he who loses his reputation is consequently exposed to extended suffering in all these points.

The exercise of this sanction is also favoured or restrained by different circumstances. Under a popular government, it is carried to the highest degree; under a despotic government, it is reduced almost to nothing.

Easy communications, and the ready circulation of intelligence, by means of newspapers, augments the extent of this tribunal, and increases the submission of individuals to the empire of opinion.

The more unanimous the decisions of the moral sanction, the greater their force. Are its decisions different among a great number of different sects or parties, whether religious or political, they will contradict each other. Virtue and vice will not use the same common measure. Places of refuge will be found for those who have disgraced themselves, and the deserter from one sect or party will be enrolled in another.

CHAPTER III.

FORFEITURE OF REPUTATION.

WE now come to consider the punishment of infamy, or forfeiture of reputation.* The nature of this punishment we have already had occasion to discuss, in treating of the moral sanction from which it derives its origin. All that remains for us to do in this place, is to state the various contrivances by which the political magistrate has gone about to modify its direction, and to augment its force.

In point of *direction*, the way in which he influences the action of this punishment is

* Though infamy is the more common, forfeiture of reputation is the more convenient expression of the two. Infamy is a term which appears forced, when applied to any other than very high degrees of the punishment in question: the phrase, forfeiture of reputation, is accommodated to one degree as well as another; for the quantity of reputation may be conceived to be divided into as many lots or degrees as there can be reason for.

The turn and structure of language having put a man's reputation, like his estate, upon the footing of his possessions, men have considered and spoken of the subject as if it were a quantity alike determinate, and as if a man might be made to forfeit the whole of his reputation at a single stroke, as he may the whole of his estate. But that this, though possible in the latter instance, is impossible in the former, will presently be seen, by tracing up these fictitious objects of possession to the real objects from whence they are respectively derived. A man's estate is derived out of *things;* out of certain determinate allotments of things, moveable or immoveable; or if any part of it be derived immediately out of persons, it is derived out of the services of a few persons, and those persons (and very frequently those services due from each person) determinate and certain. But a man's reputation is derived immediately out of *persons;* out of the services of persons; out of any services of any persons whatsoever; out of the services of as many persons, be they who they may, as choose to render him any. This is a stock which the political magistrate can never, perhaps, by any one operation, nor indeed by any number of operations of any kind, be certain of exhausting; much less by any such vague and feeble operations as those are by which an offender is commonly understood to have been made to incur the forfeiture of reputation, that is, the punishment of infamy.

If there be, it is that punishment which, if the vulgar tradition is to be depended upon, was inflicted by Richard III. on Jane Shore—the direct prohibiting of all persons from rendering to the offender any kind of service. But this is but, in other words, the punishment of *starving*. The same punishment has sometimes been denounced in other countries, where, being strictly executed, it has been, as it could not but be, attended with that effect.[a]

[a] Case of the Albigenses.—See Rapin (Monfort).—See Watson's Phil. 2d.

very simple. It is this: by annexing it to the commission of any act which, by prohibiting, he has constituted an offence.

In point of *force*, he may influence it by various means.

The methods by which this may be done may be divided, in the first place, into *legislative* or *executive*. 1*st*, It may be done by methods simply legislative, without any of that interference which, in the case of ordinary punishments, is necessary, of the executive power: the law in this case commits to each individual, in as far as he himself is concerned, the office of judge and executioner. 2*d*, But in this case, as in any other, the law may carry itself into execution in the ordinary methods of procedure; authorizing the judge, either in imitation of his predecessors, or in conformity to the letter of positive law, to direct and animate the resentment of the community at large.

By the simple exercise of the legislative office, the law may annex to any mode of conduct a certain quantity of disrepute, in the following ways:—

1. By simply prohibiting any mode of conduct, although no political penalty be also employed to enforce the prohibition. This is the lowest degree in which the political magistrate can be instrumental in applying the force of the several sanctions. This slightest exertion of the force of the moral sanction is inseparable, we see, from an exertion of that of the political. A few words may be of use on this occasion, to show to what causes it is owing that a certain share of the former of these forces is become, as it were, appurtenant to the other.

2. If no political penalty is denounced, the community find in this circumstance a stronger or additional reason for annexing their disesteem to the breach of it. For since it must be evident to the legislator, as it is to every man, that no rule can have any effect without a motive to prompt a man to observe it, his omitting to annex any other penalty is naturally understood to be a kind of tacit warning to the community at large to take the execution of the law into their own hands. All he does in such case, is to give *direction* to the moral sanction, trusting to its native force for the execution of his law.

3. If the ordinance be accompanied by an express exhortation to obey it, or, what comes to much the same thing, if the terms in which it is delivered savour of exhortation, this is another and more express declaration of his persuasion of the utility of the ordinance he promulgates. And the more anxious he is that it should meet with obedience, the more pernicious [it shows] he appears to deem the conduct of any one who disobeys it, or at least the more convinced he shows himself to be, that, to a certain degree at least, the non-observance of it would be pernicious to the community.*

5. A fifth expedient, by which the moral sanction is called upon in a manner still more express to enforce a political ordinance, is by censure directly levelled at him, whosoever he shall prove to be, that shall infringe it. This censure may be levelled at the offender either immediately, or else mediately, by being immediately pointed at the offence.†

6. A sixth expedient is by transferring, or at least endeavouring to transfer, upon one offence, the measure of disrepute that naturally attends upon another. The way in which this is done, is by affecting to regard the obnoxious practice in question as an evidence of another practice, on which men are already in the habit of bestowing a superior degree of disrepute.‡ It is plain that the cases in which this can be attempted with any prospect of success must necessarily be limited. To warrant the inference, some appearance in connexion, however superficial, there must be between the two offences. But any little connexion, however slight, is ordinarily sufficient. In such a case, men in general are not apt to be very difficult with regard to the evidence. The vanity of being thought sagacious, the pride of sitting in judgment and condemning, the hope of earning a certain measure of reputation on the score of virtue at an easy rate, the love of novelty and paradox, and the propensity

* This anxiety may be grounded or excited, not solely by a supposed utility of the law, but in some degree by a supposed propensity in the people to disobey it.

† Of terms of condemnation applied directly to the offence, the *improbè factum* of the Lex Valeria may serve for an example: "Valeria Lex, quum eum qui provocásset virgis cædi securique necari voluisset, siquis adversus ea fecisset, nihil ultra quam *improbè factum* adjecit."—Livy, l. 10, ch. 8.

The laws of Greece and Rome afford several examples, where for different offences the offender is pronounced infamous.[a]

‡ Of this we have an example in certain laws of Zaleucus, the Locrian legislator, pretended to have been preserved (says my authority) by Diodorus Siculus: "Let not a free woman go forth from the city in the night, *unless* when she goes to prostitute herself to her gallant. Let her not wear rich ornaments, or garments interwoven with gold, unless she be a courtezan."—Princ. of Pen. Law, c. 26.

This was as much as to say, that if he knew of a woman's going abroad in a lone place at the unseasonable hour he is speaking of, the legislator should take it for granted that such was the errand she went out upon. If she dressed in a manner in which it was particularly the business of courtezans to dress, he should take for granted her being of that stamp.

[a] So by 9 Anne c. 14, § 5, a loss at play, if prosecuted on that statute, is to be declared infamous.—*Vide etiam* stat. Ed. 6.

to exaggeration, especially on the unfavourable side, second the aim of the legislator.

So much for the ways in which the political magistrate may exert an influence over the moral sanction by the bare exercise of his *legislative* powers: we now come to the instances in which he requires the assistance of the executive.

Of all the expedients that may be classed under this head, the least severe is that of *publication* — the making public the fact of the offence, accompanied with a designation of the offender. It is principally in point of *extent* that a measure of this sort tends to add to the natural *quantum* of disrepute; though something likewise may be supposed to be contributed by it in point of *intensity*, on account of the certainty which it gives to men's opinions of the delinquency of the offender. Even this mode of proceeding, mild as it may appear, is capable of various degrees of severity, according to the various degrees of publicity that may be given to the fact. It may be registered in a written instrument to which few people have access; it may be registered in a written instrument to which any person may have access. It may be notified by proclamation, by sound of trumpet, by beat of drum. Since the invention of printing, it may be recorded in indelible characters, and circulated through the whole state.* It is obvious, that the discredit reflected by this expedient, must be greater or less in point of intensity, as the offence is esteemed more or less disreputable.

The censure which in the law is pronounced in general terms upon such uncertain persons as may chance to become offenders, may, upon conviction, by the assistance of the executive power, be brought home to, and personally levelled at any individual offender. And this may be done in a manner more or less public, and either in a settled form of words, or with more latitude in a speech *ad libitum*, to be delivered by the judge.†

But the severest expedient for inflicting infamy is that which consists in the applying of some political punishment, which, by its influence on the imaginations of mankind, is in possession of the power of producing this effect. This leads us to inquire into the different measures of infamy that stand naturally annexed to the several modes of punishment; and in the course of this inquiry we shall find reason to distinguish certain punishments from the rest, by the special epithet of infamous.

A certain degree of infamy or disrepute, we have already remarked, is what necessarily attends on every kind of political punishment. But there are some that reflect a much larger portion of infamy than others.‡ These, therefore, it is plain, are the only ones which can be stated properly by that name.

Upon looking over the list of punishments, we shall find that it is to those which come under the name of corporal punishments that this property of reflecting an extraordinary degree of infamy is almost exclusively confined. Pecuniary punishments, which are the most common, are attended with a less degree of infamy than any other, unless it be quasi-pecuniary punishments; which in this respect, as in most others, are pretty much upon a par with pecuniary. Next to these come the several modes of confinement; among which, if there be any difference, *quasi* imprisonment and local interdiction seem the mildest in this respect; next to them, banishment and imprisonment the severest. Of specific restraints and active punishments at large, they are so various, that it is not easy to give an account. In general, they seem to be on a footing with those punishments that are mildest in this respect, unless where, by means of analogy, they are so contrived as to reflect and aggravate in a peculiar manner the infamy of the offence.‖ The same account may be given of all the other kinds of forfeiture.

With regard to corporal punishments short of death, there is no punishment of this class but is understood to carry with it a very high degree of infamy. The degree of it, however, is not by any means in proportion to the organical pain or inconveniences that are respectively attendant upon those punishments. On the contrary, if there be any difference, it seems as if the less the quantity is which a punishment imparts, of those or any other kind of inconveniences, the greater is the quantity which it imports of

* In certain offences against the police,—for instance, in selling bread by shortweight,—it is not an uncommon thing, where the degree of delinquency appears to be considerable, for the magistrate to threaten the offender, that upon the next conviction he shall be advertised in the newspapers. Such a punishment seems to be looked upon as more severe than the fine imposed by statute.

† When the punishment is capital, or the sentence discretionary, it is common with us in England to preface it with such a speech.

‡ Aware of this circumstance, the Roman lawyers have taken a distinction between the *infamia facti* and the *infamia juris*—the natural infamy resulting from the offence, and the artificial infamy produced through the means of the punishment by the law. See Heinecc. Elementa Jur. Civil. Pand. l. 3, tit. 2, § 399, whose explanation, however, is not very precise.

‖ Such as the obligation to ask pardon—an instance of active punishment: the forbearing to carry on an employment which the offender has exercised fraudulently—an instance of restrictive punishment: the forbearing to come into the presence of the party injured—an instance of ambulatory confinement.

infamy. The reason may be, that since it is manifest the punishment must have been designed to produce suffering in some way or other, the less it seems calculated to produce in any other way, the more manifest it is that it was for this purpose it was made choice of. Accordingly, in regard to punishments to which the highest degrees of infamy are understood to be annexed, one can scarcely find any other suffering which they produce. This is the case with several species of transient disablement; such as the punishments of the stocks, the pillory, and the carcan: and with several species of transient as well as of perpetual disfigurement; such as ignominious dresses and stigmatization. Accordingly, these modes of punishment are all of them regarded as neither more nor less than so many ways of inflicting infamy. Infamy thus produced by corporal punishments, may be styled corporal ignominy or infamy.

According as the corporal punishment that is made choice of, for the sake of producing the infamy, is temporary or perpetual, the infamy itself may be distinguished into temporary and indelible. Thus the infamy produced by the stocks, the pillory, and the carcan, is but temporary; that which is produced by an indelible stigma is perpetual. Not but that any kind of infamy, howsoever inflicted or contracted, may chance to prove perpetual; since the idea of the offence, or, what comes to the same thing, of the punishment, may very well chance to remain more or less fresh in men's minds to the end of the delinquent's life: but when it is produced by an indelible stigma, it cannot do otherwise than continue so long as the *mark* remains, whatsoever happens to him: wheresoever he goes, and how long soever he lives, he bears about him the evidence of his guilt.

Mutilation and the severer kinds of simple afflictive punishments, discolourment, disfigurement, and disablement, are all attended likewise with a very intense degree of infamy; that is, in as far as the effects produced by them are known to be produced on purpose in the way of punishment. But with regard to many of the sorts of punishment that come under the three latter heads, as the effects of them are, upon the face of them, no other than might have been produced by accident, they are therefore the less certain of producing the effect of infamy. The infamy produced by these punishments is, in point of duration, of a mixed nature, as it were, between temporary and perpetual. At the time of the execution, it stands upon a par in this respect with the pillory or the stocks, with whipping or any other kind of simple afflictive punishments: after that time, it is greater than what is produced by any of these punishments, because the visible consequences still continue: it is not, however, so great as what is produced by stigmatization, because it does not of itself, like that galling punishment, make known the guilt of the delinquent to strangers at the first glance.

Nearly allied to corporal infamy are two other species of infamy, which, as they derive their influence altogether from that which is possessed by corporal infamy, may be styled quasi-corporal. The one is inflicted by an application made, instead of to a man's body, to some object, the idea of which, by the principle of association, has the effect of suggesting to the imagination the idea of a punishment applied actually to the body itself. This, inasmuch as it operates by the force of symbols or emblems, may be styled symbolical or emblematical corporal infamy.* The other is inflicted by a punishment applied, indeed, to the body, but not till after it has ceased to be susceptible of punishment — I mean, not till after death: this may be styled *posthumous* or post-obitory corporal infamy.†

To the head of forfeiture of reputation, must be referred a forfeiture of a very particular kind — forfeiture of credibility; that is, in effect, forfeiture of so much of a man's reputation as depends upon the opinion of his veracity. The effect of this punishment (as far as it can be carried into effect) is to cause people to bestow on the delinquent that share of ill-will which they are naturally disposed to bear to a man whose word they look upon as not being to be depended upon for true.

This punishment is a remarkable instance of the empire attempted, and not unsuccessfully, to be exercised by the political magistrate over the moral sanction. Application is made

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* Among the ancient Persians, in some cases, when the criminal was of high rank, instead of whipping the man himself, it was the custom to whip his clothes. To this head may also be referred the custom which prevails in France and other nations upon the continent of executing criminals in effigy. The feigned punishment inflicted on the effigy is commonly, I suppose, the same that would have been really inflicted upon the man's person for the same offence; nor is it usual, I believe, to employ this punishment where the delinquent is forthcoming.

In Portugal, several of the persons who were concerned in the attempt upon the late king's life were punished in this manner.

† To this head may be referred a part of the punishment in use in England for high treason, according to the common law; the taking out and burning of the entrails, the cutting off the head, and the dividing the body into four quarters, which are disposed of at the King's pleasure. 2 *Hawkins*, 443.

By an English statute, in cases of murder, the judge is enjoined to order the body (after the criminal has been put to death by hanging) to be publicly dissected, and is empowered to order it to be hung in chains, as the phrase is; which is practised by suspending it from a gibbet in an iron frame.

to the executors of that sanction, that is, the public at large, to bestow on the delinquent not so much of their disesteem in general, nor yet so much of their disesteem as they are disposed to annex to some particular offence of which he has been found guilty, but such a share as they are disposed to annex to another offence of which he has not been proved guilty, and which, unless by accident, has no connexion with that of which he has actually been proved guilty.

The method, too, which is taken to inflict this punishment, is equally remarkable. It is inflicted, not by any restraint or other punishment applied to the delinquent, but by a restraint laid upon another person—a judge; or by an inconvenience which may be of any kind whatsoever, thrown (as the case may require) upon any person whatsoever. The judge is forbidden to interrogate him, or to permit him to be interrogated as a witness in any cause, as also to pay any regard, on any such occasion, to any instrument purporting to contain his written attestation. The party who may have stood in need of his evidence, for the preservation of his life, liberty, or fortune; or the public, who may have stood in need of it to warrant the punishment, and guard itself against the enterprises of another, perhaps more atrocious, criminal, are precluded from that benefit.

I know not of any instance in which it is absolutely clear that a man has been made to incur this singular kind of forfeiture in the express view of punishment. In all the cases in which it has been adopted, it is not impossible but that the restraint which it imports may have been imposed in no other view than that of improving the rules of evidence, and guiding the judge against error in his decision upon the questions of fact brought before him.

Be this as it may, it is certain that in the English law it stands annexed, in many instances, to offences which have not the remotest connexion with the veracity or mendacity of the offender.*

To this head also must be referred the punishment of forfeiture of rank, otherwise entitled degradation. For the purpose of understanding this modification of ignominious punishment, reputation must be distinguished into natural or *ordinary*, and factitious or extraordinary. By *natural* share of reputation and good-will, I mean that which each man possesses in virtue of his own personal conduct and behaviour: by factitious, I mean that extraordinary share of these possessions which, independently of a man's personal conduct, is bestowed on him by the institution and contrivance of the political magistrate.

This kind of factitious reputation is commonly annexed to office or employment; but it sometimes exists by itself. This is the case, for instance, in England, with the ranks of gentlemen, esquire, knight, and baronet, and the ranks derived from academical degrees.

Rank may be conferred either by custom or by authority. When derived from custom, it is annexed either to family or to occupation: when derived from authority, it is annexed to the person. But whether it were conferred by authority or no, it is in the power of authority to diminish the reputation belonging to it, if not wholly to take it away. A sentence of a judge, degrading a man from the rank of gentleman, cannot cause a man not to have been born of a father that was a gentleman, but it may divest him of a greater or less share of that respect which men were disposed before to pay him on that account.

As to the mode of inflicting degradation, it may be inflicted by any process that serves to express the will of the magistrate, that the delinquent be no longer considered as possessing the rank in question, with or without corporal ignominy.

Degradation, did it answer precisely to the definition given of it, when it is styled forfeiture of rank, should take away from a man that precise quantity of reputation, and consequently of good offices, and consequently of happiness, for which he stands indebted to his rank. But as these quantities are incapable of being measured, or even estimated with any tolerable degree of exactness, the punishment of degradation can never with any certainty be made to answer precisely to such definition. It seems probable, that a man who has once been possessed of a certain rank, can never be totally deprived of all the reputation, respect, and good offices that are commonly rendered to that rank: the imaginations of mankind are too stubborn to yield instant and perfect obedience to the nod of power. It seems probable, notwithstanding, that the condition of a man who has undergone a degradation of rank, is thereby commonly rendered worse upon the whole than if he had never been possessed of it; because, in general, simply not to possess, is not so bad as, having possessed, to lose. To speak with more precision, it should seem that the characteristic pain of the moral sanction produced by such a punishment, is in

* For instance, to high treason, or the adherence to the unsuccessful side in a competition for the Crown: to homicide committed in revenge, on a sudden quarrel, or in the course of a duel, by consent: to rape, and other irregularities of the venereal appetite. This, however, seems to proceed not so much from design as from inattention in the authors of our common law; and is one of the many absurd and mischievous consequences that follow from the lumping together offences of the most heterogeneous natures under the name of felonies.

general more than equivalent to the sum of such of the casual benefits of that sanction as the punishment fails to take away.

It is common enough to speak of a *total* loss of reputation; and some jurists speak of such a loss as if it could easily be, and were frequently incurred. But such a notion is not compatible with any precise idea of the import of that term. To understand this, it will be necessary to conceive in idea a certain average or mean quantity of reputation equal to zero, from whence degrees of good reputation may be reckoned on one side, and of bad reputation on the other. This mean quantity of reputation, or good-will, call that which any given member of the community may be deemed to possess, who has no rank, and who either has neither merits nor demerits, if such a human being be conceivable, or rather, whose merits stand exactly upon a level with his demerits. All *above* this average quantity may be styled *good* reputation, all *below* it *bad* reputation. In one sense, then, a total forfeiture of reputation should consist of nothing more than a total forfeiture of good reputation, as thus defined. Now then, according to this account of the matter, a total forfeiture of reputation would be nothing more than what is very possible, and indeed must be very frequent. But it is plain that this is not what the jurists, nor indeed what persons in general, in speaking of a total forfeiture of reputation, have in view. For all that this would amount to, would be the reducing the delinquent to a level with a man of ordinary merit and condition: it would not put his reputation upon so low a footing as that to which a man of ordinary merit and reputation would be reduced by the slightest instance of moral or political delinquency. What they have in view is the acquisition, if one may so term it, of a certain share of ill reputation, the quantity of which they view in a confused manner, as if it were determinate, and consisted of all the ill reputation a man could possibly acquire. But this, it is plain, it never can do, at least in the cases to which they apply it. For they speak of such an event as if it could be, and commonly were, the effect of a single instance of delinquency; for instance, a robbery or ordinary murder. This, it is plain, it can never be, unless it should be maintained that an act of parricide, for example, would not make a man worse looked upon than he was before, after having committed only a robbery or ordinary murder. It is plain that the maximum of bad, as well as that of good reputation, is an infinite quantity, and that in this sense there is no such thing within the sphere of real life as a total forfeiture of reputation.

§ 2. *Simple Ignominious Punishments examined.*

The infliction of ignominious punishment is an appeal to the tribunal of the public—an invitation to the people to treat the offender with contempt, to withdraw from him their esteem. It is (to speak in figurative language) a bill drawn upon the people for so much of their ill-will as they shall think proper to bestow. If they look upon him in a less favourable light than they would otherwise, the draft is honoured: if they do not, it is protested, and the charge is very apt to fall upon the drawer. Ignominious punishments are like those engines which are apt to recoil, and often wound the hand that unadroitly uses them.

But if skilfully managed, what important services may they not be made to render! The legislator, by calling in to his aid, and trusting to the moral sanction, increases its power and the extent of its influence: and when he declares that the *loss of honour* is to be considered as a severe punishment, he gives to it in the eyes of every man an additional value.*

1. This species of punishment, so far as it goes, is not without some commodious properties: it is *variable* in quantity, from the paternal admonition of the judge, to a high degree of infamy. Accompanied with more or less publicity, with various circumstances of disgrace and humiliation, the legislator may proportion the punishment to the malignity of the offence, and adapt it to the various circumstances of age, rank, sex, and profession. Every station in life will, for this purpose, afford facilities that are peculiar to it, and in particular the military.

In point of variability, punishments of this kind have an advantage over every other mode of punishment. This quality is desirable in a mode of punishment, that it may be capable of being made to bear a due proportion to every offence to which it is annexed. With regard to all other kinds of punishments that are constituted solely by the law, the proportion must be settled by the law; whereas this mode has a tendency to fall into that proportion of itself. The magistrate pronounces—the people execute. The people, that is, as many of the people as think proper: they execute it, that is, in whatever proportion they think proper. The malignity towards the delinquent is in general proportionate to the malignancy of his offence. It is not, however, like corporal punishment, capable of being universally applied to all offences. In many cases, an offence may be productive of real mischief, but a mischief which the people, the executioners

* See Traités de Legislation, tom. iii. c. 17. Emploi du Mobile de l'Honneur.

of this mode of punishment, are not qualified to perceive. On this part of the subject we shall have occasion to speak further presently.

2. In point of *exemplarity*, this mode of punishment cannot be excelled. Whatever it is that a man suffers by the publication of his offence, whether by degradation or by being subject to ignominious exposure, it is evident that he suffers it from the infamy attached to his character under the sanction of the legislator.

3. In point of *frugality*, it is advantageous enough. The mischief apprehended from the ill-will annexed to a disreputable act, bears, I suppose, at least as high a ratio to the eventual mischief, as the mischief apprehended from any other mode of punishment does to the eventual.

4. In point of *popularity* it cannot be excelled. For what objection can the people have to a man's being punished in this manner, when all that is done to him is the giving them notice that within the bounds which the law allows, they themselves may punish him as they please — when they themselves are both judges and executioners?

5. They are *remissible*. An erroneous sentence may be annulled. A greater degree of notoriety may be given to the justification, than accompanied the condemnation. The stain that had been thus affixed on his character will not only be completely effaced, but the supposed offender, from the unjust persecution that he will have undergone, will become a general object of sympathy, and especially to those who have been instrumental in inflicting the punishment.

What is more, even though justly inflicted, the patient, by the stimulus he will have received, may be excited to exertions to recover the esteem he has lost, and to earn fresh honours to hide his disgrace. In the army it has happened that whole bodies of troops, after having been stigmatized by their officers, have atoned for their offence by distinguished acts of valour, and have received the highest marks of honour.

This advantage is not possessed by ignominious corporal punishments: the stain that they leave is indelible; and unless the patient expatriates himself, his lost reputation is irrecoverable.

Having thus stated the properties that belong to punishments of this kind, we proceed to notice a difficulty which arises in their application, and which is peculiar to them. The legislator cannot at pleasure attach to any given species of offence the degree of infamy that he may be desirous of affixing to it. There are some classes of offences really detrimental to the country, such, for example, as election bribery and smuggling, for the punishing of which the legislator has no means of pressing the great bulk of the people into the service. Upon other points, the popular sentiments are in direct opposition to those of the legislature: there are others, on which they are wavering, neutral, or too feeble to serve his purpose. The case of duelling may serve as an example.

"So far," says Rousseau, "is the censorial tribunal from leading the public opinion, it follows it: and when it departs from it, its decisions are vain and nugatory."*

Be it so: but what follows from this? Is it that the legislator is to be the slave of the most mischievous and erroneous popular notions? No: this would be to quit the helm, while the vessel was surrounded with rocks. His greatest difficulty will consist in conciliating the public opinion, in correcting it when erroneous, and in giving it that bent which shall be most favourable to produce obedience to his mandates.

The legislator is in an eminent degree possessed of the means of guiding public opinion. The power with which he is invested gives to his instructions, whenever he may bestow them, far greater weight than would be attributed to them if falling from a private individual. The public, generally speaking, presumes that the Government has at its command, more completely than any private man, the requisite sources of information. It is presumed also, that in the great majority of cases its interest is the same with that of the people, and that it is unbiassed by personal interest, which is so apt to misguide the opinion of individuals. If things go on unprosperously, the responsible agents become subject to the animadversion of the public; if prosperously, they have the credit and the advantage. Of this, people in general have a confused notion, and it is the ground of their confidence.

In extirpating prejudices that appear to him to be mischievous, the legislator has the means of laying the axe to the root of the evil. He may form institutions which, without inculcating doctrines in direct repugnance to received opinions, may indirectly attack them. Instead of planting against them a battery, he may sink a mine beneath them, the effect of which will be infallible.

The legislator is clothed not only with political, but with moral power. It is what is commonly expressed by the words consideration, respect, confidence. There are not wanting instances in which, by means of such instruments, the most important effects have been produced.

A certain degree of infamy, it is obvious, must naturally result upon a conviction for any offence which the community are accustomed to mark with their displeasure: thus much results from the bare conviction, in-

* *Contrat Social*, liv. iv. c. 7.

deed from the bare detection, without any express designation of the magistrate. The only way, therefore, in which the magistrate can produce any additional degree of infamy — I mean all along pure and simple infamy — is by taking extraordinary measures to make public the fact of the offence. In this way it is only in point of *extent* that the magistrate adds to the actual portion of infamy that flows from the offence.

In point of intensity, there is but one way in which the law can contribute anything to the infliction of simple infamy. This is by bestowing on the act in question some opprobrious appellation — some epithet, calculated to express ill-will or contempt on the part of him who uses it. Thus, a legislator of ancient Rome (in a passage of Livy, quoted by the Author of Principles of Penal Law,*) after describing a particular mode of offence, is said to have done nothing more towards punishing it, than by subjoining these words, *improbè factum.* Here the legislator begins the song of obloquy, expecting that the people will follow in chorus. The delinquent is to be pelted with invectives, and the legislator begins and casts the first stone.

But when the object of the legislator is to conciliate the public opinion, and especially when that opinion is opposite to the one he would establish, he must address himself to their reason.

I hope it will not be supposed that, under the name of *reasons*, I have here in view those effusions of legislative babbling — those old-womanish aphorisms, mocking the discernment of the people, degrading the dignity of the legislature, which stuff up and disgrace the preambles of our statute-books: "Whereas it has been found inconvenient — Whereas great mischiefs have arisen," — as if it were endurable that a legislator should prohibit a practice which he did *not* think "inconvenient," which he did *not* think "mischievous," and as if, without his saying as much, the people would not give him credit for wishing that it might be believed he thought it.

Of what sort, then, should the reasons be, which the legislator ought to employ to back and justify an epithet of reproach? They should be such as may serve to indicate the *particular* way in which the practice in question is thought liable to do mischief; and by that means point out the analogy there is between that practice, and those other practices, more obviously, but perhaps not more intensely mischievous, to which the people are already disposed to annex their disapprobation. Such reasons, if reasons are to be given, should be simple and significant, that they may instruct — energetic, that they may strike — short, that they may be remembered.

Take the following as an example in the case of smuggling: — *Whosoever deals with smugglers, let him be infamous. He who buys uncustomed goods, defrauds the public of the value of the duty. By him the public purse suffers as much as if he had stolen the same sum out of the public treasury. He who defrauds the public purse, defrauds every member of the community.*†

As the legislator may lay the hand of reproach upon him who counteracts the purposes of the law, so may he take it off from him who forwards them. Such is the informer — a sort of man on whose name the short-sightedness and prejudice of the people, inflamed by the laws themselves, have most undeservedly cast an odium. The informer's law might be prefaced in the following manner:

It is the artifice of bad men to seek to draw contempt upon them who, by executing the laws, would be a check upon their misdeeds. If the law is just, as it ought to be, the informer is the enemy of no man, but in proportion as that man is an enemy to the rest. In proportion as a man loves his country, he will be active in bringing to justice all those who, by the breach of the laws, entrench on its prosperity.

It will be remarked, that in this new part of the law — in this struggle to be made against the errors of the moral sanction — there is work for the dramatist as well as the legislator, or else, that the politician should add somewhat of the spirit of the dramatist to all the information of the lawyer. Thus wrote the legislators of ancient days — men who spoke the significant and enchanting language of Ancient Greece. Poetry was invited to the aid of law. No man had ever yet thought of addressing the people in the barbarous language that disgraces our statute-book, where the will of the legislator is drowned in a sea of words. Habited in a Gothic accoutrement of antiquated phrases, useless repetitions, incomplete specifications, entangled and never-ending sentences, he may merely, from incomprehensibility, inspire

* P. 290, 1st edit.

† I say the public purse — I do not say the public simply. Far from the pen of the legislator be that stale sophistry of declaiming moralizers, which consists in giving to one species of misbehaviour the name and reproach of another species of a higher class, confounding in men's minds the characters of vice and virtue. Pure from all taint of falsehood should the legislator keep his pen; nor think to promote the cause of utility and truth by means which only tyranny and imposture can stand in need of. In what I have said above, there is nothing but what is rigorously and simply true. But it were not true to say that a theft upon the public were as mischievous as a theft upon an individual: from this there results no alarm, and the more the loss is divided, the lighter it falls upon each.

terror, but cannot command respect. It may be matter of astonishment, why the arbiters of our life and of our property, instead of disporting themselves in this grotesque and abject garb, cannot express themselves with clearness, with dignity, and with precision: the best laws would be disfigured if clothed in such language.

"In a moderate and virtuous government," says an elegant and admired writer, "the idea of shame will follow the finger of law."

Yes, so as his finger be not so employed as to counteract and irritate the determined affections of the people. He goes on and says, "Whatever species of punishment is pointed out as infamous, will have the effect of infamy." True, whatever is appointed by the legislator as a mark to signify his having annexed his disapprobation to any particular mode of conduct, will have this effect: it will make the people sensible that he wishes to be *thought* to disapprove of that mode of conduct; in most cases, that he does really disapprove of it. But to say, that whatever the legislature professes to disapprove of, the people will disapprove of too, is, I doubt, going a degree too far.

We may direct his attention to an instance of an offence which, under as moderate and virtuous a government, I dare believe (all prejudices apart,) as ever yet existed, laws have rendered penal, magistrates have endeavoured to render infamous, by a punishment which in general marks the patient with infamy, but which no laws, no magistrates, no punishments, will in this country ever render infamous. I mean state-libelling.

The offence of libelling, as marked out by the law as it stands at present, is this: it is the publishing, respecting any man, anything that he does not like. This being the offence of libelling in general, the offence of state-libelling is the publishing, respecting a man in power, anything which he does not like.

A libel is either *criminative* or *vituperative*. By criminative, I mean such an one as charges a man with having done a specific act (determinable by time and place,) of the number of those that are made punishable by law. By *vituperative*, simply vituperative, I mean such an one as, without charging a man with any specific fact, does no more than intimate, in terms more or less forcible, the disapprobation in which the libeller holds the general conduct or character of the party libelled. Such are all those epithets of vague reproach, — liar, fool, knave, wicked profligate, abandoned man, and so forth; together with all those compositions which, in the compass of a line, or of a volume, intimate the same thing. A criminative libel, therefore, is one thing: a vituperative is another. The law knows not of these terms; but it acknowledges the distinction they are here intended to express.

Of these two, a libel of the criminative kind admits, we may observe, of another much more confined and determinate definition: a vituperative libel will admit of no other than that which is given above.

Now then, so it is, that for a libel simply vituperative, against a private person, the law will not let a man be punished by what is called an action to the profit of the party, unless it be under particular circumstances, which it is not here the place to dwell upon. But by imprisonment, or to the profit of the crown, by what is called an indictment, or more especially what is called an information, it will let him be punished at the caprice, (for no rules are or can be laid down to guide discretion)—at the caprice, I say, and fancy of the judges. For a libel of the criminative kind, against a private person, the law will not let a man be punished, if the libeller can prove his charge to be a true one. But for a libel against a man in power, criminative or vituperative, true or false, moderate or immoderate, it makes a man punishable at all events, without distinction. If it be true, it is so much the worse: judges, thinking to confound reasoning by paradox, have not scrupled to hazard this atrocious absurdity. The judges of antiquity broached it long ago; succeeding judges have adhered to it; present judges, whose discernment cannot but have detected it—present judges, as if borne down by the irresistible weight of authorities, recognise it, and it triumphs to this hour.

This being the case, he who blames the proceedings of a man in power, justly or unjustly, is a libeller: the more justly, the worse libeller. But for blaming the proceedings of men in power, and as they think justly, never will the people of this country look upon a man as infamous. Lawyers may harangue, juries may convict; but neither those juries, nor even those lawyers, will in their hearts look upon him as infamous.*

The practical conclusion resulting from this is, that the legislator ought never directly to oppose the public opinion by his measures, by endeavouring to fix a stain of ignominy upon an act of the description of those in question, which are equally liable to originate

* In 1758, Dr. Shebbeare, was pilloried[a] for writing a libel against the then King, under a Whig administration. He stood in triumph: the people entertained him with applause. At another time, J. Williams, bookseller, was pilloried for publishing a libel against his Majesty George the Third, under an administration charged with Toryism: the people made a collection for him. At another time, W. Beckford, Lord Mayor of London, replied extempore, in an unprecedented and affrontive manner, to a speech from the throne: the citizens put up his statue in Guildhall. Shame did not then, I think, follow the finger of the law.

[a] 2 Bur. 792.

in the most virtuous as in the most vicious motives, and which consequently escape general reprobation.

But it is not less true, that in a very extensive class of cases, an argument addressed to the understandings and sentiments of the people, would, if properly applied, have some considerable effect, as well as an argument addressed to their fears. If he thought the experiment worth trying, the legislator might do something by the opinion of his probity and his wisdom, and not be forced to do everything by the terror of his power. As he creates the political sanction, so he might lead the moral. The people, even in this country, are by no means ill-disposed to imagine great knowledge where they behold great power. A few kind words, such as the heart of a good legislator will furnish without effort, will, if the substance of the law be not at variance with them, be enough to dispose the people to be not uncharitable in their opinion of his benevolence.

Not that the legislator in our days, and in those countries which, on the subject of government, one has principally in view, ought to expect to possess altogether the same influence over the moral sanction as was exercised by the legislators of such small states as those of Greece and Italy in the first dawnings of society. The most prominent reason of this difference is, that in monarchical governments it is birth, and not any personal qualifications, that fix a man in this office. It is rare that the person in whose name laws are issued, is the person who is believed to make them. It is one thing to make laws, and another to touch them with a sceptre.

The Catherines and Gustavuses govern, and are seen to do so. Other princes are either openly governed, or, locking up their bosoms from the people, reign as it were by stealth.

In a mixed government like our's, where the sovereign is a body, he has no personal character. He shows himself to the people only in his compositions, which are all that is known of him. By those writings he may doubtless give some idea of his character. But as his person is in a manner fictitious and invisible, it is not to be expected that the idea of his character should make so strong an impression upon the imagination of the people, as if they had the idea of this or that person to connect it with.

In the small states of Greece, the business of legislation stood upon a very different footing. The Zaleucuses, the Solons, the Lycurguses, were the most popular men in their respective states. It was from their popularity, and nothing else, that they derived their title. They were philosophers and moralists, as well as legislators: their laws had as much of instruction in them as of coercion; as much of lectures as of commands. The respect of the people had already placed the power of the moral sanction in their hands, before they were invested with the means of giving direction to the political. Members of a small state, the people of which lived as if they were but one family, they were better known to the whole people for whom they made laws, than with us a Member ordinarily is by the people of the county he is chosen for.

In those days, men seem to have been more under the government of opinion than at present. The word of this or that man, whom they knew and reverenced, would go further with them than at present. Not that their passions, as it should seem, were more obsequious to reason; but their reason was more obsequious to the reason of a single man. A little learning, or the appearance of it, gleaned from foreign nations, gave a man an advantage over the rest, which no possible superiority of learning could give a man at present. *Ipse dixit* is an expression that took its rise from the blind obsequiousness of the disciples of Pythagoras, and not uncharacteristic of the manner of thinking of those who pretended to make any use of their thinking faculty throughout ancient Greece.*

CHAPTER IV.

OF PECUNIARY FORFEITURES.

We now come to consider the several kinds of Forfeitures; and, first, the sorts of forfei-

* Let me be permitted here to illustrate what has been said of the power possessed by ancient legislators, by a modern example, borrowed from what to some persons will appear a frivolous subject, and certainly from a frivolous person. The legislator in question was a master of ceremonies. For a long series of years, by the authority of opinion, *Nash*, commonly called *Beau Nash*, regulated at Bath the conduct of the company assembled at that place during the season: sovereign arbiter and director of all points pertaining to the custom and etiquette of the place, of the order in which balls, concerts, &c. were to succeed each other. How did he go to work? "*Let such a thing be done*," said the legislator of the Bath Assemblies. "*Let not such a thing be done.*" "*Let such an Assembly take place on such a day: that it begin at such an hour, that it finish at such an hour*," &c. &c. Setting aside the extreme disparity of the object, the resemblance is striking between these ordinances of fashion, and such laws of antiquity as have been handed down to us. There were no punishments, properly so called. The company assembling met there, confiding in his prudence and experience in the concerns he had to regulate, put into his hands a certain quantity of the power of the moral sanction, and the public voice was ready to be raised against the infractors of his rules; and laws the weakest in appearance, were most strictly obeyed.

ture that bear the name of pecuniary and *quasi*-pecuniary: forfeiture of money, and what is exchangeable for money.

A pecuniary forfeiture is incurred when a man is, by a judicial sentence, compelled to pay a sum of money to another, or, as it is in some cases called, a fine.

As to the methods which may be taken by the law to inflict a punishment of this sort, they are as follows:—

1. The simplest course is to take a sum of money, to the amount in question, out of the physical possession of the delinquent, and transfer it into the physical possession of the person who is to receive it; after which, were he to meddle again with the money so taken, he would be punished just as if he had meddled with any other parcel of money that never was in his possession. This course can only be taken when it happens to be known that the delinquent has such a sum in his possession, and where it lies. But this is seldom the case.

2. The next and more common expedient is to take such and such a quantity of what other corporal effects he may have in his physical possession, as, if sold, will produce the sum in question, and to make sale of them accordingly, and bestow the produce as before.

3. Another expedient is, to make use of compulsive means to oblige him to produce the sum himself. These means will be either, 1*st*, The subjecting him to a present punishment, to be taken off as soon as he *has* done the thing required; or, 2*d*, The threatening him with some future punishment, to be applied at such or such a time, in case of his *not* having done by that time the thing required.

4. A fourth expedient is, to take such property of his, whether in money or other effects, or whereof, though the legal right to them, or in a certain sense the legal possession of them, is in him, the physical possession is in other people. As the existence of such legal right, and the place where the effects in question are deposited, are circumstances that can seldom be known but by his means, this makes it necessary to apply compulsion to him, to oblige him to give the requisite information.

Of these four expedients, the first and second commonly go together, and are put in practice indiscriminately at one and the same operation. The officer to whom the business is entrusted, if he finds money enough, takes money; if not, he takes other effects to make up the deficiency. The first, then, may, in future, be considered as included under the second.

In England, the second and the third have both of them been in practice from time immemorial: not indiscriminately, however, but according to the name that has been given to the punishment by which the money has been exacted. When this punishment has been called a *fine*, the third method has been exclusively employed: when it has been called damages, the second and third have been employed together—not, indeed, in their full force, but under certain restrictions, too particular to be here insisted on.

The fourth is comparatively of late invention. It was first applied to traders by one one of the bankrupt laws, and has since been extended by the insolvent acts to persons at large, where the obligation they are under to pay money bears the name of debt. Such is the case in many instances where that obligation is imposed with a view to punishment.

§ 2. *Pecuniary Forfeitures examined.*

1. As to the evils produced by a punishment of this kind, they are all reducible to the *pain of privation* occasioned by the loss of so much money.*

2. Pecuniary forfeiture shares with penal servitude in the striking advantage of being *convertible to profit.*

The quantity of profit is not limited in this case as in that. This is its peculiar excellence; and this it is that adapts it particularly to the purpose of compensation.

3. In respect of *equality*, it is not less advantageous. No punishment can be made to sit more equally than this can be made to sit on different individuals; so as the quantum of it be proportioned to the means which the delinquent has of bearing it. For money (that is, the ratio of a given sum of money to the total sum of a man's capital) we have already shown to be the most accurate measure of the quantity of pain or pleasure a man can be made to receive. The pleasures which two men will be deprived of, by being made to lose each a given part (suppose a tenth) of their respective fortunes, will in *specie* perhaps be very different; but this does not hinder but that, on taking into the account quantity on the one hand, and actual expectations and probable burthens on the other, they may be the same: they will be the same as nearly as any two quantities can be made to be so by any rule of measuring. It is from his money that a man derives the main part of his pleasures; the only part that lies open to estimation. The supposition we are forced to follow is, that the quantities of pleasure men are capable of purchasing with their respective capitals are respectively equal. This supposition is, it must be supposed, very loose indeed, and inaccurate, because the quantity of a man's capital is subject to infinite fluctuations, and because there is great reason to suppose that a richer man is apt to be happier, upon an average, than a poorer

* See Introd. to Morals and Legislation, ch. 3.

man. It is, however, after all, nearer to the truth than any other general suppositions that for the purpose in question can be made.

4. In point of *variability*, it is evident nothing can excel this mode of punishment, as far as it extends. It commences at the very bottom of the scale. In this respect it has greatly the advantage over corporal punishments, which are always complicated with a certain degree of infamy; while in the instance of pecuniary punishments, no other infamy is produced than what is necessarily attached to the offence.

5. In respect of *frugality*. Pecuniary punishment, especially when the relative quantum of it is great, is liable to a disadvantage which balances in some degree against the advantage which it has of being convertible to profit. Along with the delinquent, other parties who are innocent are exposed to suffer; *to wit*, whatever persons were comprised within the circle of his dependents. This suffering is not the mere pain of sympathy, grounded on the observation of his suffering: if it were, there would be no reason for making mention of it as belonging in a more especial manner to the present mode of punishment. It is an original pain, produced by a consciousness of the loss which they themselves are likely to incur by the impoverishment of their principal. This evil, again, is not a mere negative evil; the evil which consists in the not being to have the comforts which, had it not been for his impoverishment, they would have had. If it were, there could be no more reason for taking it into the account on this occasion, than the pain of sympathy; for, whatever it be, it is balanced, and that exactly, by the pleasure that goes to those persons, whosoever they be, to whose profit the money is applied. The pleasure resulting from the use of that money is neither diminished nor increased by the operation: it only changes hands. The pain, then, that is peculiar to this species of punishment, is neither more nor less than the pain of disappointment produced by the destruction of those expectations which the parties in question had been accustomed to entertain, of continuing to participate in the fortune of their principal, in a measure proportioned to that in which they had been accustomed to participate in it.

6. In point of *exemplarity*, it has nothing in particular to boast of. At the execution of it, no spectacle is exhibited: the transfer of a sum of money on this account has nothing to distinguish it from the case of an ordinary payment. It is not furnished with any of those symbolical helps to exemplarity which belong to most punishments of the corporal kind. Upon the face of the description, the exemplarity it possesses is in proportion to the quantum of it; that is, in the ratio of the quantum of the forfeiture to the capital of him whom it is to affect.

There is one case, however, in which it is particularly deficient in this article: this is when it is laid on under the shape of costs. Upon the face of the law, nothing occurs from whence any adequate idea can be drawn of what eventually turns out to be the quantum of the punishment.

7. In point of *remissibility*, it is in an eminent degree advantageous. Under no other mode of punishment can reparation be made for an unjust sentence with equal facility.

8. In point of *popularity*, this punishment exceeds every other. It is the only one of any consequence against which some objection or other of the popular cast has not been made.

9. In point of *quantity*, pecuniary forfeitures are susceptible of varieties which may have considerable influence on their effects.

The quantum of such a forfeiture, as inflicted by statute or common law, may be either discretionary or indeterminate; or if determinate, it may be either limited or fixed: and in either case, it may be determined either absolutely or by reference. In the latter case, with regard to the standards by which it is determined, it would manifestly be in vain to attempt to set any bounds to their variety. The circumstances most commonly made choice of for this purpose are — 1. The profit of the offence; 2. The value of the thing which is the subject-matter of the offence; 3. The amount of the injury; 4. The fortune of the offender.

In England, a punishment of this kind is known in different cases by different names, which have nothing to do with the nature of the punishment (that is, of the suffering) itself, nor essentially with the manner in which it is inflicted. They are taken only from the accidental circumstance of the manner in which the produce of the punishment is disposed of.

When this produce is given to the king or his grantee, the punishment being left unlimited by the legislature, after the quantum of it has been settled by a judge, it is called Fine.

When, after being limited by the legislature, it has been settled by the judge, the name employed to denote it by, howsoever applied, has commonly been the general term of Forfeiture.

When the *quantum* of it has been left unlimited by the legislature, and the produce of it given to a party injured by the offence, the punishment is called Damages. In this case, the settling of the quantum has generally been committed to a jury.

§ 3. *Of Quasi-pecuniary Forfeitures.*

By quasi-pecuniary forfeitures, I mean the

forfeitures of any kind of property that is not money, but is of such a nature as admits of its being exchanged for money.

The enumeration of the different species of property belongs more to a treatise upon civil law, than to a work upon punishments. As many species of property, so many species of forfeiture.

The observations we have made upon pecuniary punishments may in general be applied to quasi-pecuniary punishments. The evil produced by their infliction may be estimated according to the pecuniary value lost; but there is one exception to be made with respect to objects possessing a value in affection. An equivalent in money will not represent any of the pleasures attached to these objects. The loss of patrimonial lands, of the house which has passed from father to son in the same family, ought not to be estimated at the price for which those lands or that house would sell.

Punishments of this kind are in general more exemplary than pecuniary punishments. The confiscation of lands, of a manor, for instance, more visibly bears the marks of a punishment, attracts the attention of a greater number of persons, than a fine of the same or of a greater value. The fact of the possession is a fact known through all the district — a fact of which the recollection must be recalled by a thousand circumstances, and perpetuated from generation to generation.

These considerations open a vast field for reflection, upon the use of confiscations of territorial property, especially in the case of those equivocal crimes called rebellions or civil wars. They perpetuate recollections which ought to be effaced. We shall recur to this subject when we speak of *Punishments misplaced.*— Book IV.

CHAPTER V.

FORFEITURE OF CONDITION.

WHEN the property under consideration consists of a real tangible entity, as a house or lands, it presents itself under its most simple and intelligible shape: but when it is of an *incorporeal* nature, it can only be designated by abstract terms; and to explain those terms it is necessary to have recourse to those real entities from which those fictitious entities derive their name and their signification. In order to explain the nature of any particular condition in life, for example that of husband, it is necessary to state the right conferred upon him by the law, over the person, the property, and the services of an existent being — the woman to whom he is married. To explain the nature of *rank*, it is necessary to explain the rights that it confers — the exclusive privilege of using a certain title, of being habited in a particular manner, of being entitled to priority upon certain occasions; in short, to enjoy such honours as are attached to the particular rank in question So far the effect produced is produced by the operation of the law. As to the honour itself, which is the source of their value, it depends upon the moral sanction. It is, however, a species of property. A man invested with a certain rank is entitled to receive from persons at large unexigible services, services of respect, and which will be generally rendered to him in consideration of his rank.

In respect of *offices* — public offices — we may point out the power possessed by the person holding them over his subordinates, the emoluments that are attached to them, and the unexigible services that may result from the possession of them; that is to say, benefits resulting from the disposition that may be supposed to be felt by persons at large to render services to a man placed in an official station.

By the same process we may explain the nature of all rights; for example, the right of voting in a parliamentary election. Every person in possession of this right has the privilege of giving a vote, by which he influences the choice of the person to be vested with a particular species of power. The value of this interest, under the present state of things, consists principally in giving the elector a certain power over the candidate and his friends. An honest and independent exercise of this right is a means of acquiring reputation. To generous and benevolent minds there also accrues from it a pleasure of sympathy, founded on the prospect of public happiness, that is to say, upon the influence that the choice of a virtuous and enlightened candidate may have upon the public welfare.

The value of a condition in life, of a right, of a privilege, being explained to consist in power, profit, and reputation, that is to say, the pleasures resulting from the possession of it, we are in possession of all the necessary elements for estimating the evil accruing from their loss, or, in other words, the magnitude of the punishment occasioned by their forfeiture.

To give an analytical view of all the modifications of which property is susceptible, and every species of forfeiture to which it may be exposed, would be a work of almost endless labour. We shall content ourselves here with giving a few examples, beginning with,

§ 1. *The Matrimonial Condition.*

The evils liable to be experienced by the husband from the forfeiture of this condition, consist in the loss of the pleasures belonging to it.

1. The pleasures which are the principal objects in the institution of marriage, may be divided into — 1*st*, Pleasures of sense; and 2*d*, Pleasures proceeding from the perception of an agreeable object, which depends partly on the senses, and partly on the imagination.

2. The innumerable minor pleasures of all kinds resulting from those inexigible services which belong to a husband's authority. Notwithstanding their variety, they may be all of them comprised under the head of pleasures of possession.

3. The pleasures resulting from the use of the property derived from the wife: these belong to the same head as the preceding.

4. Where the wife has separate property, over which a power of disposal is reserved to her, pleasure resulting from the hope of becoming possessed of this part of her property. Pleasure of expectation founded on the pleasures derivable from the possession of wealth.

5. The pleasure resulting from the persuasion of being beloved — this affection producing a variety of uncompellable services, which have all the charms of appearing to be as spontaneous as those that are the result of friendship. These pleasures may be referred to the pleasures of the moral sanction.

6. The pleasure resulting from the good repute of the wife, which is reflected upon the husband, and which has a natural tendency, as honour derived from any other source, to conciliate to him the esteem and good-will of persons in general. This may also be referred to the pleasures arising from the moral sanction.

7. The pleasure of witnessing her happiness, and especially that part of it which he is most instrumental in producing. This is the pleasure of benevolence or good-will.

8. The pleasure resulting from the several uncompellable services received at the hands of the family of which he has become a member. This may be referred to the pleasures of the moral sanction.

9. The pleasure of power, considered generally, independently of any particular use that may be made of it, with which he is invested, in virtue of the exclusive controul he possesses over the fund for reward and punishment. This may be referred to the pleasures of the imagination.

10. The pleasure resulting from the condition of father. This we shall have occasion to notice in considering the evils resulting from the forfeiture of the condition of father.

This same catalogue, with such slight variations as the reader will find no difficulty in making, is applicable to the condition of wife.

The task of coolly analyzing and classifying feelings of this nature may appear tedious, but it is not the less necessary, if we would estimate the amount of evil resulting from the loss of this condition.

§ 2. *The Paternal Condition.*

The evils resulting from the forfeiture of the condition of father may be referred most of them to the loss of the following pleasures: —

1. The pleasures derived from the imagining his own existence perpetuated in that of his child. This is a pleasure of the imagination.

2. The pleasure of having at his command, during the child's minority, the services that he may be in a condition to render. This is a pleasure of power.

3. The pleasure of employing, in so far as it can be done without diminution, the separate property of this child. This is a pleasure referable to two sources — that of father, and of guardian (of which presently.)

4. The pleasure of filial affection — a pleasure of the moral sanction.

5. The pleasure reflected upon him by the good repute of his child. This also is a pleasure of the moral sanction.

6. The pleasure of advancing the happiness of his child — pleasure of benevolence or good-will.

7. The pleasure derived from the several inexigible services that he may hope to receive from the connexions that his son, as he grows up, may form in the world — pleasure of the moral sanction.

8. The pleasure resulting from the sentiment of paternal power. This is a pleasure of the imagination.

9. In some cases, the pleasure derived from the expectation of becoming possessed of the whole or a part of the property the child may have acquired, or in case of his death the actual possession of such property. Pleasure, in the one case, of expectation founded on the pleasures derivable from the possession of wealth; in the other case, from the actual possession of wealth.

§ 3. *Condition of Child.*

Pleasures belonging to the condition of child: —

1. The pleasure derived from the use of the exigible services of the parent.

2. The pleasure resulting from the power of using certain parts of the property belonging to the father.

3. The pleasure resulting from the persuasion of being beloved by him.

4. The pleasure derived from the good repute of the father, which is reflected upon the child.

5. The pleasure of witnessing the father's happiness, and of contributing to promote it; a pleasure rendered more vivid by being accompanied with sentiments of gratitude.

6. The pleasure resulting from the connexions of the father, and the right he may have to certain services at their hands.

7. The pleasure derived from the hope of inheriting the whole or a part of his father's property; or if he be dead, from the possession of the property.

§ 4. *Pleasures derived from the Condition of Trustee.*

The pleasures resulting from standing in the condition of trustee, are the following:—

1. The pleasure resulting from the hope of contributing to the happiness of the individual whose interest is in question. This is a pleasure of benevolence or good-will.

2. The pleasure derived from the hope of the inexigible services to be expected from the gratitude of the individual in question. Pleasure of the moral sanction.

3. Pleasure founded on the hope of receiving inexigible services at the hands of persons benefited by the being entrusted with the use of the trust-property. This also is a pleasure of the moral sanction.

4. Pleasure founded on the hope of sharing in the esteem, the good-will, and the inexigible services of the different persons to whom his capacity and probity in the management of the trust property may have become known. This is also a pleasure of the moral sanction.

5. When a salary is annexed to the duty: pleasure of pecuniary profit.

It is but too well known, that the pleasures respectively belonging to these conditions are liable to vanish, and at any rate to be alloyed by a corresponding set of pains. These pains are too obvious to need insisting on. The value of any such condition may therefore be either positive or negative; in plain terms, a man may either be the better for it, or the worse. Where the value of it is positive, it will consist of the sum of the values of the several pleasures, after that of the several pains had been deducted: when negative, as the sum of the value of the pains after that of the pleasure has been deducted. When, therefore, the value of any such condition happens to be negative, a sentence taking a man out of it must needs operate, not as a punishment but as a reward.

With regard to those pleasures or benefits which are common to several of the above conditions, it is manifest that, though the pleasure is in each of these several cases nominally the same, they are liable to be very different in point of value. Thus the pleasure of contributing to the happiness of the person who forms the other term in the relation, is incident to the condition of parent, and also to that of a guardian: but it is more certain and more vivid in the case of the father than in that of the guardian. To engage, however, further in such details, besides their being so obvious, would lead us from the subject of politics to that of morals.

Let us now proceed to consider the manner in which the several forfeitures may be produced, or, as the case be, any part of them may be employed as an instrument of punishment.

The advantages of the conjugal condition may be subtracted as a punishment by a judicial sentence, declaring that the offender is not, or shall not be any longer considered as the husband or wife of the person in question.

The consequence of such sentence would be, not completely to destroy the advantages of that condition, but to render them precarious.

If after this sentence has been pronounced, they cohabit, or are suspected of cohabiting together, the woman is considered as a concubine. When this sort of connexion is known to subsist, it is in some countries punished by the moral sanction, in others, both by the moral and political.* By legal divorce, a man is also deprived, in the whole or in part, of the inexigible services derived from the right he has over the property of his wife, and especially of those services derived from cohabitation; it would make him dependent upon her with respect to the testamentary disposition over such part of her property of which she might have an absolute power of disposal.

With respect to the pleasures derivable from the relation of father, the law, it is true, cannot deprive a man altogether of the pleasures connected with this condition, but it may be greatly embittered; as, for example, by a retrospective sentence, declaring his children to be illegitimate. Upon those who might be born subsequent to the sentence of divorce, the punishment would fall with much greater certainty, for the public opinion, which would not be forward in supporting the degradation of children born under the faith of lawful wedlock, would not exercise the same indulgence towards those who were born after a divorce.

The paternal and filial condition may, in so far as the nature of the case admits of it, be in the same manner subtracted by a judicial sentence, declaring that the offender is

* By the laws of the State of Connecticut (North America)—"If a man and woman who have been divorced shall again cohabit together as man and wife, they shall be punished as adulterers;" and "the punishment for adultery is discretionary whipping, branding in the forehead with the letter A, and wearing a halter about the neck on the outside of the garments, so as to be visible. On being found without the halter, on information and proof made before an assistant or justice of the peace, he may order them to be whipped not exceeding thirty stripes." —*Swift's Laws of Connecticut*, vol. ii. p. 328.

not, or shall no longer be considered as the father or the son of the person in question.

The certain effects of a sentence of the kind in question, in respect of the father, would be to deprive him of all legal power over the person of his child: in respect of the child, to deprive him of taking by inheritance or representation the property of his father.

As to the other advantages derivable from these relations, the sentence may or may not have any effect, according to the feelings of the parties interested; its operation will depend upon the father and the son — upon their more immediate connexions, and upon the public in general.

As to the office of guardian, and other offices of a fiduciary nature, the sentence will operate to the whole extent of those offices: a legal interdiction of all the acts annuls all the advantages issuing from them.

It may at first sight appear extraordinary that a power should be attributed to the magistrate, of destroying relations founded in nature. It is, it may be observed, an event — an event that has already happened; and how can it be in the power of any human tribunal to cause that which has taken place, not to have taken place? This cannot be accomplished; but the magistrate may have power to persuade people to believe that an event has happened in a manner different from what it actually did happen. It is true that, upon the parties themselves, and upon the persons who have a direct knowledge of the fact, the power of the magistrate, as to this purpose, is altogether nugatory; but with the public at large, an assertion so sanctioned would have the greatest weight. The principal obstacle to the exercise of any such power, however, is, that a declaration to this effect as a penal instrument, would, upon the face of it, bear marks of its own falsehood. This is a dilemma from which there is no escaping. If the offender is not the father of the person in question, to declare that he is not, is not an act of punishment: if he is his father, the declaration is false.

The idea of employing as a mode of punishment the subtraction of any of the rights attached to the several conditions as above, is not, however, so extravagant as at first might be imagined. If not the same thing, what approaches very near to it, is already in use.

This object may be effected in two modes: one, the endeavouring to cause it to be believed that the offender does not stand in the relation of father or of son, as the case may be, to the person regarded as such: the other is in endeavouring to cause it to be believed, that from the non-observance of some legal form, the progeny is illegitimate.

A case somewhat analogous to this, is that famous one upon which so many volumes have been written — *corruption of blood*; or, in other words, the perfection of inheritable blood. The plain object, stripped of all disguise, is to prevent a man from inheriting, as he would have done if this punishment had not been pronounced: but what is endeavoured to be done, by the help of this expression, is to cause it to be believed that the blood of the person in question undergoes some real alteration, which is a part of the punishment.

Another example in which, at least in words, a controul is assumed over events of the description of those in question, is, by that barbarous maxim, that a *bastard is the son of no one* — a maxim which has a tendency, as much as it is in the power of words to give it, to deprive a man of all parental connexions. It is not, however, ever employed as a punishment.

Another example, opposite to the preceding one, is that other legal maxim, *pater est quem nuptiæ demonstrant* — a maxim by which sanction is frequently given to a palpable falsehood. By recent decisions, the severity of this rule has, however, been relaxed; it being now settled, that though marriage is to be considered as presumptive proof of filiation, it may be rebutted by evidence of the impossibility of any connexion having taken place.

In France, a mode of punishment has been employed, which, it is true, without any such pretence as that of destroying the fact of parentage, endeavoured, as far as might be, to abolish all trace of it, by imposing on the person in question the obligation of changing his name.*

The same punishment has been employed in Portugal.†

The punishment consisting in the forfeiture of credibility is another example, no less remarkable, of an attempt to exercise a despotic controul over the opinions of men. As part of the punishment for many sorts of offences, which do not import any want of veracity, the offender is declared to have lost all title to credence: the visible sign of this punishment is the not being permitted to depose in a court of justice.

The forfeiture of the conjugal condition, at least to a certain extent, is frequently among the consequences of imprisonment, especially when with imprisonment is combined penal labour. This part of the punishment is not formally denounced, but it is not the less real. It is not ever in express terms de-

* This was done in the case of Damiens and Ravaillac.

† In the case of certain persons convicted of an attempt against the life of the King.

clared that a man is divested of this condition; but he is in fact precluded from the principal enjoyments of it, and the condition, separate from the pleasures that belong to it, is evidently nothing more than a mere name. The forfeiture is temporary or perpetual, according as the imprisonment is either one or the other.

§ 5. *Condition of Liberty.*

Liberty being a negative idea — exemption from obligation — it follows, that the loss of liberty is a positive idea. To lose the condition of a freeman, is to become a slave. But the word slave, or state of slavery, has not any very definite meaning which serves to designate that condition as existing in different countries. There are some countries in which slavery is unknown. In countries in which slavery is in use, it exists under different forms, and in different degrees. The pain of servitude would be different, according to the class to which the offender might be aggregated.

Slaves are of two classes: they may belong to the government or to individuals.

The condition of public slaves, determined by regulation, fixing the nature and amount of the work, and the coercive punishments by which the performance of it may be compelled, is not distinguishable from the condition of persons condemned for life to penal labour: if there exist no such regulations, it varies little from private slavery. A public slave, unprotected by any such regulations, is placed under the despotic controul of an overseer, who is bound to employ him, for the benefit of the public, in a certain sort of occupation: this power, arbitrary as it is, does not extend to life and death. This condition varies very little from that of private slavery. A negro, for example, employed upon a plantation belonging to the crown, is not from this circumstance in a condition greatly superior to what he would be in if standing in the same relation to a private individual, who, instead of being his own overseer, employed an agent for that purpose.

The most ready means of forming a correct conception of the condition of slavery, is by considering it, in the first instance, as absolute and unlimited. In this situation the slave is exposed to every possible species of evil. The punishment designated, then, by the expression, forfeiture of liberty, is no other than the being exposed to a greater or less chance, according to the character of the master, of suffering all sorts of evils; that is to say, of all evils resulting from the different modes in which punishment may be inflicted. To form an accurate notion of this situation, all that is required is to glance the eye over all the possible varieties of punishment. The slave, with respect to the individual standing in the condition of master, is absolutely deprived of all legal protection.*

Such is the nature of slavery under its most simple form: such is the nature of the total deprivation of liberty. The different restrictions that may be imposed on the exercise of this power, renders the state of servitude more or less mild.

There are, then, two heads to which the evils resulting from this condition may be referred: —

1. The risk, on the part of the slave, of being subject to every possible evil, with the exception of such only as the master is expressly prohibited from inflicting; 2. The continuity of the pain, founded on the apprehension of these sufferings.

§ 6. *Condition of Political Liberty.*

I shall say but one word upon a subject that would require a volume.

The loss of political liberty is produced by a change in the condition, not merely of any particular individual, but of the whole community. The loss of liberty is the result of a fresh distribution of the power of the governing body — a distribution which renders the choice of the persons, or their measures, less dependent upon the will of the persons governed. A fresh distribution of power depends absolutely upon a corresponding disposition to pay obedience to that fresh distribution. When superior physical force is in the possession of those from whom obedience is demanded, it is evident that the power of commanding can be exercised only in so far as that obedience is rendered. As this disposition to pay obedience may be produced by the conduct of a single individual of the governing class, it may be, and has frequently been said, that a single man has destroyed the constitutional liberty of a whole nation. But if the analysis of such events be followed out, it will be found that this liberty can be destroyed only by the people themselves.

CHAPTER VI.

FORFEITURE OF THE PROTECTION OF THE LAW.

A CLASS of forfeitures, as miscellaneous and extensive as any, and the last that we shall now take notice of, is that of the *protection*, whatever it be, which the law affords a man for the enjoyment of the objects of possession. This is not altogether the same thing with a forfeiture of the possessions themselves. In the instance of some of them, the law, by taking from him the possessions them-

* Such a condition would be too rigorous for criminals: it is for innocent men that it is reserved.

selves, excludes him, by sure and physical means, from the enjoyment of them. In the instance of others, the law, without taking away from him altogether the physical capacity of enjoying them, punishes him in the case of his attempting to enjoy them. In the remaining cases, the law uses not either of those compulsive methods: it, however, does an act by which the parties on whose choice the enjoyment of the object in question depends, are disposed, on pre-established principles, to put an end to it. It therefore, in this case, likewise becomes still the author of the punishment. This is the case with the forfeitures in which the political sanction produces its effect, not by its own immediate energy, but by the motion it gives, if one may so say, to the moral and religious sanctions.

In the case of forfeiture of protection, the law takes no such active part. All it does is this: it simply withdraws, in part or altogether, that punishment by means of which it protects a possessor in the enjoyment of those several possessions. If, then, every man refrain from disturbing him in the enjoyment of any such possession, it is well the law does nothing of itself to prompt them to it. But if any persons of their own motion choose to disturb him, it is also well the law does nothing of itself to hinder them. Forfeiture of protection is, in short, neither more nor less than the forfeiture of the use of the ministers of justice; that is, of such persons whose business it is to protect the several members of the community in the enjoyment of their respective rights.

Between forfeiture of protection, and forfeiture of capacity, the difference is, that by the latter, the law *does* what is necessary to prevent a man's acquiring a possession: in the former, it *forbears* to do anything to prevent his losing it. When considered with reference to the individual who has forfeited the protection of the law, this species of punishment may be called forensic disability; it forms part of the artificially complex punishment of outlawry; the consideration of which will be subsequently resumed.*

BOOK IV.

OF THE PROPER SEAT OF PUNISHMENT: OR SAY, OF MIS-SEATED PUNISHMENT.

What is here meant by mis-seated punishment, is *not* that which in another place was meant by groundless punishment.

The case in which the epithet *groundless* was applied to the subject punishment, is that in which, by the supposition, there was no offence in the case — no act to which, by the annexation of eventual punishment, any such character as that of an offence ought, by the legislature, to have been superinduced.

The case in which the epithet *mis-seated* is applied to the same subject — the case which on the present occasion is in view — is that in which there exists an offence; that is, an act fit to be, as above, converted into an offence — an act to which it is fit that punishment be accordingly attached, and in which case punishment is attached accordingly. Thus far all is right: but what there is wrong in the case consists in this, that punishment is to be found, which, *in consideration of the same offence*, has been attached to a *wrong* person; that some persons, one or many, are to be found, on whom, in respect of that same offence, no punishment from which they could have been saved ought to have been attached, but on whom punishment, of some sort or other, from which they might have been saved, does notwithstanding stand attached.

When, in so far as, by appointment of the legislature or of the judge, acting (as in all cases of unwritten or judge-made law) in the place of the legislator, punishment is inflicted on any person by whom no part has been borne in the offence, it may be said to be mis-seated—seated in a place which is not its proper place.

In this case, if, along with the non-offender, no offender suffers, the mis-seated punishment may be, as in practice it has been termed, *vicarious:* if in the contrary case, extravasated punishment; that is, flowing in a wrong channel.

Punishment ought naturally to be the work of reflection: but whether it be vicarious or extravasated, should there be found an instance in which the infliction of it appears to have been the result, not so much of reflection and thought, as of want of thought—and the mass of such instances will be found but too extensive — in such case it may be termed *random* punishment.

Punishment (which is mis-seated, and in particular, that which is in an extravasated state), may be so unavoidably or avoidably.

First, as to the case in which the extravasation is unavoidable. On another occasion, in another work, and for another purpose, this case has already been brought to view; viz. under the head of "*Circumstances influencing sensibility.*"†

Whether in the way and for the purpose of punishment, or in any other way, and for any other purpose, a man cannot be made to suffer, but his connexions, if he have any — always his connexions in the way of sympathy,

* Book V. ch. v.

† Introduction to Morals and Legislation.

frequently his connexions in the way of interest (understand self-regarding interest,) are made to suffer along with him; and forasmuch as it can only be by some rare accident that a man can be found who has not, in either of those ways, any connexions; thence it follows, that if, where it is unavoidable, the certainty or probability of its extravasation were regarded as a sufficient cause for forbearing to inflict punishment, it would only be by a correspondently rare accident that any thing could be done for the prevention of offences of any sort; the consequence of which would be general impunity to crimes and other offences of all sorts, and with it the destruction of society itself.

In so far as it is mis-seated, and is not unavoidably so, punishment, it is almost needless to observe, is, with reference to the person on whom it is thrown, *groundless:* as such it is thrown away; it is so much evil expended in waste: — reformation, determent, disablement — it contributes not anything to any one of the proper ends of punishment — not so much as to vindictive satisfaction for injury: at least, to any mind that is not more or less deranged, it is repugnant to utility, inconsistent with humanity, inconsistent with justice.

To all these it is repugnant; but what it is not repugnant to, is English law, written as well as unwritten; for under both these dispensations, instances of it are to be found — instances altogether deplorable in extent, as well as abundance.

When the epithet *unavoidable* is on this occasion employed, some such limitative clause as is expressed by the words *without preponderant inconvenience*, must be understood. For, in point of possibility, punishment, *i. e.* the infliction of suffering on that score, being on the part of the legislator and the judge an act of the will, to avoid inflicting it will, on this as on every other occasion, be respectively in their power at all times, not only on this but on every occasion. On so simple a condition as that of seeing government, and with it society itself, perish, you may avoid inflicting punishment altogether.

Bearing continually in mind this necessary and not unobvious limitation, in answer to the question, what, in regard to mis-seated punishment, ought to be the conduct of the legislator? two simple propositions may be laid down without difficulty: —

1. One is — Where it is unavoidable, mis-seated punishment may be employed.

2. Where it is avoidable, mis-seated punishment ought in no case to be employed.

Unhappily, there exists not a system of established law which does not exhibit instances in which mis-seated punishment is thus wrongfully employed.

First, as to the case when the application thus made of the matter of punishment is unavoidable — not to be avoided without letting in, in some other shape, evil in such a quantity, as, after deduction made of the evil saved on the score of punishment, shall leave a nett balance on the side of evil upon the whole.

Now, taking the matter on the footing of the principles of utility, — punishment, however mis-seated, not only may be, but ought to be introduced: and on the part of him by whom that principle is embraced, and taken for his constant guide, to say that of punishment so circumstanced that it ought not to be introduced, would be equivalent to a contradiction in terms.

But, says an objector, punishment, in so far as it is inflicted, falls upon the guiltless, and to inflict punishment on the guiltless is to violate one of the most important, and fundamental, and universally recognised principles of justice.

The answer is: This being one of those principles which in substance are continually alluded to, but which in truth are not any where to be found, cannot with propriety be employed in the character of an objection to any rule which, standing expressed in a determinate form of words, is seen to be unexceptionable.

To inflict punishment when, without introducing preponderant inconvenience, the infliction of such punishment is avoidable, is, in the case of the innocent, contrary to the principle of utility. Admitted: — and so is it in the case of the guilty likewise.

To punish where, without introducing preponderant inconvenience, such punishment is unavoidable, is not in either case contrary to the principle of utility; — not in the case of the guilty: no, nor yet in the case of the innocent.

What, then, are the cases in which the application of punishment to the innocent is avoidable? what the cases in which it is unavoidable?

Answer: Wheresoever, punishment not being, in the case in question, in itself undue, it is in your power to apply to the guilty, punishment in as great a quantity as (supposing it actually administered) is commensurate to the end of punishment — namely, without having recourse to the innocent, there the evil, whatsoever it be, that would be produced by the infliction of punishment on the innocent, is avoidable.

Now the fact is, and so it will be found, that (with the exception of such suffering as extravasates and overflows upon the innocent, in consequence of their connexion in the way of sympathy or particular and casual interest) wheresoever the nature of the case admits of the distinguishing who is innocent from who is guilty, the infliction of suffering on the innocent is avoidable.

Define punishment in a certain way, and

even the above limitation need not be made. Say that to give it the character of punishment, it is necessary that the suffering that is inflicted should, the whole of it, be directly intentional — that is, either mediately or ultimately intentional; and in that case, such part of the suffering as, in virtue of their connexion with the guilty person, falls unavoidably upon third persons (a wife or husband, children, relations, dependants, friends or creditors, and so forth,) is not punishment — does not come under the denomination of punishment.

This, however, is but a question of words. Take any lot of evil you will, such as it is, it is, whatsoever be its name. Say that it *is punishment*, the reason for avoiding to produce it, if unavoidable, will not be the stronger; say that is *not* punishment, the reason for avoiding to produce it, if avoidable, will not be the weaker.

§ 1. *Naturally Extravasating Punishment— Rules concerning it.*

In regard to such punishment as comes under the denomination of derivative or naturally extravasating punishment, the following seem to be the rules that may be laid down: —

1. The consideration that the lot of punishment in question comes under the denomination of derivative or extravasating punishment — punishment overflowing upon the guiltless from the guilty — can never of itself constitute a sufficient reason for forbearing to inflict such punishment.

For were that a sufficient reason, punishment could not, in the way of legislation, be appointed in any case.

2. In so far as punishment not coming under this denomination is capable of being inflicted to a sufficient amount, without the addition of any punishment which comes under this denomination; in other words, in as far as properly seated punishment to a sufficient amount is capable of being inflicted without the addition of derivative or extravasating punishment, no such addition ought by the legislator to be appointed, viz. either prescribed or authorised.

3. For so far as, without prejudice to the sufficiency of the remainder, the lot of punishment actually to be inflicted is capable of being cleared of derivative or extravasated punishment (punishment or suffering borne by those who have had no share either in the commission of the offence or in the benefit of the offence) — such clearance ought always to be made.

4. In the account taken of the suffering, for the purpose of any punishment which is about to be inflicted by the judge, such derivative suffering ought always be comprised: comprised, in the first place, in respect of what it is in itself and of itself; in the next place, in respect of the pain which, if inflicted on the innocent connexions of the guilty person, it may be expected to produce, viz. in the shape of a pain of sympathy, in the bosom of the guilty person himself.

5. Accordingly, in the case of a delinquent having such connexions, to the end that the *real* quantity of punishment may not be greater than in the case of a delinquent in the same degree of delinquency having no such connexions, the *nominal* may be — and, so far as the deduction is capable of being made with sufficient precision, ought to be — made by so much the less.

6. For the purpose of making any such allowance as may be requisite on this score, proceed thus: In the first place, settle with yourself what would be a sufficient punishment, on the supposition that the delinquent had no connexions: then, inquiring into such connexions, if any, as he has, proceed to make such abatement, if any, as may be requisite on this score.

7. For any such purpose, the view of the judge must not absolutely confine itself to the connexion itself, the outward and visible sign and presumptive evidence of the internal and invisible sympathy, viz. the fact that the delinquent has a wife, has children, has other persons in his dependence. Of the existence of the degree of sympathy naturally and usually attached to the species of relationship in question, the existence of the relationship itself may, it is true, be received in the character of *primâ facie* or presumptive evidence; such evidence as, in default of evidence to the contrary, may be taken for conclusive.

But supposing any such contrary evidence to be offered, or to be capable of being, without preponderant inconvenience, collected, such presumptive evidence as above mentioned ought not to be taken and acted upon as if conclusive.

If, for example, it appear, that in consequence of ill usage inflicted by him, his wife has been separated from him, it is not right that, on that account, he should be let off with a less punishment, merely because he has a wife: if it appear that, in consequence of ill usage, or desertion, or neglect, on his part, children of his have been taken in hand and provided for by some relation or private friend, or some public institution, it is not right that, merely because he has children, he should be let off with a less punishment, as above.

8. In so far as it is in the nature of the punishment to extract and provide any quantity of matter applicable to the purpose of compensation, the legislator and the judge, respectively acting within their respective spheres, ought not, in the care taken by them to avoid the production of unnecessary

mis-seated punishment, to confine themselves to negative measures.

If, for example, either by the general nature of the appointed punishment—imprisonment, for example, or banishment, or death — a separation be made, or, to the purpose in question, by special appointment, can be made, between the lot of the delinquent and the lot of his guiltless connexions, it may be right, out of and to the extent of the pecuniary means of the delinquent, to make a provision for his guiltless connexions.

9. In other words. So far as can be done, without reducing to too low a pitch the suffering inflicted on the delinquent, the claims of any guiltless connexion of his, to be saved harmless from such mis-seated punishment, as would otherwise be made to overflow upon them from the punishment inflicted upon him, should have the preference over the interest of the public purse.

This rule may, without reserve or difficulty, be in its full extent applied to ordinary creditors, to persons whose connexion with the delinquent is accordingly a connexion purely in the way of interest, unaccompanied with any such connexion as in the case of wife and children, or other near relatives, has place in the way of sympathy. For example, to speak particularly and precisely, on the score, and for the purpose of punishment, money extracted from the pocket of a delinquent ought not to be poured into the public purse, such sum excepted as, if any, remains to be disposed of, after satisfaction of all just and *bonâ fide* demands made, or capable of being made, by creditors.

§ 2. *Punishment apparently, but not really mis-seated — Civil Responsibility.*

One class of cases may be marked out, in which a punishment to which it may happen in appearance to be mis-seated, is not mis-seated in reality. The offence is committed by A, who is a person under power; the punishment is inflicted on B, in whom the power resides. In other words, the superordinate is made responsible for the subordinate.

To this class of cases may be aggregated the following: —

Responsibility of the husband for the wife.
..... the father for the children.
..... the guardian for his ward.
..... the madman's keeper for the madman.
..... the gaoler for his prisoners.
..... the sheriff for the gaoler.
..... the military commander for his subordinates.
..... the master for his servants.

In all these cases, though to appearance the punishment may be mis-seated, yet in point of fact the punishment is inflicted on the person having the power, not under the notion of innocence on his part, but in contemplation of delinquency on the score of negligence for an ill choice of, or want of attention to, his subordinates. It is on his part a transgression of the negative cast, consisting in the omitting to take proper precautions for the prevention of the positive offence committed by his subordinates.

Under our law, the sheriff is punished if any of the prisoners under the gaoler's custody escape. The sheriff has not the immediate custody of the prisoners; his other duties are incompatible with that. From this circumstance alone, then, there is no reason for supposing any complicity on his part. But the gaoler is appointed by him; and the object of the law is to render him circumspect in his choice. The gaoler himself is the person immediately responsible, but as the safe custody of prisoners is a matter of the highest importance, the punishment levelled at the sheriff is in the highest degree expedient, and the more so as the amount of it is in certain cases left to the discretion of the judge.

The responsibility thus imposed on superiors for the acts of their subordinates, is founded not only on the reasons above mentioned, but on others equally substantial, which have been more particularly developed before.*

§ 3. *Mis-seated Punishment, Varieties of.*

Punishment is mis-seated in either of two cases: — 1. Where the delinquent himself is not made to suffer at all, but some other is in his stead; 2. When the delinquent himself is punished, and some other guiltless person with him, in virtue of an express provision of the law.

If the delinquent himself be not punished, but some other person be, in his stead, the punishment may be called vicarious punishment. It is thus that in the case of a suicide, who is of course removed beyond the reach of human punishment, suffering is inflicted on his wife, his children, or his dependants.

When, in virtue of a social connexion between the delinquent and some other person, it passes from the delinquent upon that other, it may be styled *transitive punishment*. It is thus that in our law the children and other descendants in many cases are punished with their parents, for the delinquencies of their parents and other ancestors.

Where a large body of persons are punished at once, upon a presumption that the delinquent or delinquents are to be met with in that body, it may be styled *collective punishment*. Thus it is, in our law, corporations are in several cases punishable for the delinquencies of the co-corporators.

* See — Of Substitutive Satisfaction, p. 383.

Lastly, where along with the delinquent a person is punished who is a total stranger to him, the punishment in this case may, as far as the stranger is concerned, be styled *random punishment*. Thus it is, that by our law a person who, after certain acts of delinquency secretly committed, has bought land of the delinquent, loses his money and the land.

Punishment by lot, as is sometimes practised where the delinquents are numerous, as in large bodies of soldiery, comes not within this case. The persons who are made to cast lots are all supposed to be delinquents. There is, therefore, no punishment but what is *in propriam personam* in this case. It is not random *punishment*, but random *pardon*.

In *vicarious punishment*, we see it is a third person, as the phrase is, that is punished alone. In *transitive punishment*, a third person with the delinquent, in virtue of his connexion with him. In *collective punishment*, a large body of third persons, uncertain and indeterminate, because probably the delinquent is of the number. In *random punishment*, a single third person, who, for certain, is not the delinquent, and with whom the delinquent has nothing to do.

§ 4. *Vicarious Punishment.*

The case in which punishment is in the most palpable degree mis-seated, is that in which it has received the name of *vicarious*: Upon the person who has had any share in the offence, no punishment is inflicted, yet upon the same occasion, punishment is inflicted upon this and that person who has not had any share in the offence.

In the reign of James I. there lived a Sir Kenelm Digby, who, besides being a person of quality, was an adept in the science of medicine. Dressing of wounds is among the number of those operations that are attended with pain and trouble. By means of a powder of Sir Kenelm's invention, this inconvenience was saved. In addition to this powder, all that he required for the cure of the most desperate wound, was a little of the blood that had been made to flow from it. To this blood a competent dose of the powder being applied, the wound closed, and the cure was radical. The presence of the patient was no more necessary, than to our present quack doctors. While the compound of powder and blood was lying upon Sir Kenelm's shelves, the patient might be at the antipodes.

Exactly of a piece with the therapeutics that invented this *sympathetic powder*, for such was the name which by the author was applied to it, are the politics that gave birth to vicarious punishment.

I was about to exhibit the absurdity and mischief of this mode of punishment, but what end would it answer? A simple statement, that one man is punished for the offence of another, is calculated to produce a stronger impression on the mind, than could be produced by the aid of logic and rhetoric. An error so extravagant could never have been acted on, but from confusion of ideas, or upon suppositions, the improbability of which was altogether lost sight of.

In the English law, the only instance which is to be seen of a case of mis-seated punishment, which is clearly and palpably vicarious, is that of the punishment attached to suicide. It may perhaps be said, that the man himself is punished as much as the case will admit of; that his body used to be pierced with a stake, that he is still buried with ignominy, and that, with respect to him, every thing that could be done, is done; that this is not found sufficient, and that, as an additional check to the commission of this offence, it is necessary to call in aid the contemplation of the sufferings that his wife and children may endure by his death. But the effect of this contrivance is obviously very trifling. The prospect of the pain he shall suffer by continuing to live, affects him more than that of the pain it seems to him they will suffer upon his putting himself to death. He is more affected, then, with his own happiness than with theirs: the selfish predominate in his mind over the social affections. But the punishment of forfeiture, that is, the punishment of those relations and friends, can have the effect of preventing his design upon no other supposition than that the social affections are predominant in him over the selfish; that he is more touched by their suffering than by his own: but this is shown by his conduct not to be the case.

Nor is this all: it is not only nugatory as to its declared purpose, but in the highest degree cruel. When a family has thus been deprived of its head, the law at that moment steps in to deprive them of their means of subsistence.

The answer to this may be, that there is some species of property, which upon this occasion is not forfeited; that the law is not executed; that the jury elude it, by finding the suicide to be insane; and that, moreover, the king has the power of remitting the forfeiture, and of leaving to the widow and orphans the paternal property.

That such is the disposition of juries, and of the sovereign, is undeniable: but is that a reason for preserving in the penal code, a law that it is considered a duty invariably to elude? And by what means is it eluded? By perjury; by a declaration made by twelve men, upon oath, that the suicide was deranged in his mind, even in cases in which all the circumstances connected with the case exhibit marks of a deliberate and steady determination. The consequence is, that every suicide who dies

worth any property, is declared to be *non compos*. It is only the poorest of the poor, who, after making the same calculation that was made by Cato, and finding the balance on the same side, act accordingly, that are ever found to be in their senses, and their wives and children to be proper victims for the rigour of the law. The cure for these atrocious absurdities is perjury: perjury is the penance that, at the expense of religion, prevents an outrage on humanity.

In speaking of vicarious punishment, in order to avoid the confusion that might be produced by its liability to be ranked under this head, it may be necessary to mention a case belonging to the subject of international law — the case of reprisals in war. By a foreign nation, innocent persons are subjected to the most rigorous punishment — to confinement, and even to death, the real author of the offence not being in the jurisdiction of the foreign state. The exercise of this power is justified by necessity, as a means of preventing the infliction of injuries not warranted by the rules of war.

This is not, strictly speaking, vicarious punishment. The reprisals inflicted on his subjects operate upon the sovereign himself, either by the compassion felt for their suffering, or by the fear, if patiently submitted to, of alienating the affections of his people. It is more particularly useful between contending armies. Honour is the principal sanction of the laws of war, but the power of making reprisals is a very necessary coadjutor. In these cases, what humanity dictates is, that the sufferings inflicted on the innocent should be the least possible, consistent with the production of the desired effect; that they should be remissible, and that the utmost degree of publicity should be given to them, either by public declarations, or in any other more effectual manner.

One word more, and I have done. Instances have not been wanting in history, when an innocent person has offered to satiate the resentment of the person injured, and his self-devotion has been received in expiation. What satisfaction did the offended person reap from this sacrifice? — the degradation and shame belonging to it. The glory of the sufferer was the disgrace of the judge.

It may be asked, Is it possible to find any case in which one person may with propriety be allowed spontaneously to subject himself to the punishment designed for another — a son for his father — a husband for his wife — a friend for his friend? Such cases might perhaps be imagined; but it is useless to enter upon the consideration of such deviations from the ordinary course of things.

§ 5. *Transitive Punishment.*

It has already been observed, that it is the nature of all punishments, to affect not only those that are the immediate objects of them, but also those that are connected with the offender, in the way of sympathy, and their participation in his suffering is unavoidable. With these we have nothing to do. What we have to do with, are those that the legislator, by an express provision of the law, inflicts upon persons connected with the delinquent — punishments, the existence of which depends entirely upon the legislator, and which, as he has created, he can abrogate them. Thus, under the English law, with respect to property of a particular description, the innocent grandson, by the delinquency of his father, is made to lose the chance he had of succeeding to his grandfather, because no title can be deduced through the corrupt blood of the father: this is what, by English lawyers, is called *corruption of blood.**

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* As the subject is involved in a good deal of obscurity, it may be necessary, in order that the expediency of this mode of punishment may be understood, to state the nature of it a little more explicitly.

By a rule of positive law, founded on the most obvious dictate of utility, so obvious as to have been received with little variation over the whole world, a man is permitted to succeed, in case of death, to the property undisposed of by his next relation.

This general rule is, with a variety of caprice, with which the conceptions and expectations of the people can never keep pace, differently narrowed and modified by the different laws of various states. With us, it is not in every instance that a man is permitted to succeed to his relation. And the misery produced by the unintelligible exceptions to the general provision of the law is, in all cases, in proportion to the strength of the expectation that is thus disappointed.

Forfeiture is more penal in its consequences than *escheat*. By both forfeiture and escheat, an individual and his descendants are made to lose their chance of coming to the estate of him to whom they stood as next immediate descendants. But corruption of blood goes further. By corruption of blood, the party in question, and his descendants, are made to lose the chance they had of succeeding either to a remote ancestor, or to any collateral relation.

Offences by which the blood is said to be corrupted are styled, how different soever in their nature, by one common appellation, felonies. — Between my brother and me, the common ancestor is my father. If, then, my father commit a felony, the consequence is, I am prevented from succeeding, not only to whatever real property was my father's, but to whatever was my brother's also, or that of any one descended from him; and this because, in making out my title to the property in question, in virtue of my relationship to my brother, I must reckon through my father, although my father (such is the provision made by the law) could not himself have taken it. — Between my paternal uncle and me, the common ancestor is my grandfather. If, then, my father commit a felony, I lose the chance of succeeding, not only to whatever real

The strength of the argument lies in the metaphor: this cabalistic expression serves as an answer to all objections. The justice of the metaphor turns upon two suppositions:—

The one is, that where a man has committed a felony (stolen a horse, for instance,) his blood immediately undergoes a fermentation, and (according to the system of physiology in use upon this occasion,) becomes really corrupt.

The other is, that when a man's blood is in this state of putrescency, it becomes just and necessary to deprive his children not only of all real property, of which he was in the enjoyment, but of what might thereafter be derived through him.

The end of punishment is to restrain a man from delinquency. The question is, whether it be an advantageous way of endeavouring at this, to punish in any and what cases, in any and what mode, to any and what degree, his wife, his children, or other descendants; that is, with a direct intention to make them sufferers.

If a man can be prevented from running into delinquency, by means of punishment hung over the heads of persons thus connected with him, it is not, as in the cases above mentioned, because it is expected that they should have it in their power to restrain him, by any coercion, physical or mental, of their imposing: it is not that they are likely to have it in their power, by anything they can *do*. In the case of the wife, it is not very likely; in the case of children already born, it is still less likely; in the case of children not yet born, it is impossible. What is expected to work upon him, is the image of what they may be made to *suffer*. The punishment, then, upon them, may be, and it is expected will be, without any act of theirs, a punishment upon him. It will produce in him a pain of sympathy.

First, we will consider the case of the wife, where the punishment consists in being made to lose what is already in specific prospect: viz. The immoveable property in which she had her dower.

It has been doubted whether it were possible for a man to love another better than himself; that is, to be affected, not merely momentarily, but for a length of time together, more by the pains and pleasures of another than by his own. Some have denied the possibility; all will admit that it is extremely rare. Suppose it, then, to happen in one case out of five hundred; and, to do all possible honour to the marriage state, let us suppose that this person whom a man loves better than he does himself, is never any other than his wife. But it is not so many as half the number of men, of an age to commit crimes, that have wives. Nor is there above one in a hundred who has lands, of which a wife is endowed. Upon this calculation, there is not above one man in 50,000 of those that are liable to this mode of punishment, on whom it would operate in as great a degree as if laid on himself. In the remaining 49,999 instances, in order to produce the same effect, more punishment must be laid upon the innocent wife, than would need to be laid upon the offending husband. Let us suppose, for the purpose of the argument, that every man loves his wife half as much as he does himself: on this supposition, ten degrees or grains (or by what other name soever it shall be thought proper to call so many aliquot parts of punishment) must be laid upon the wife, in order to produce, the effect of five grains laid directly upon the husband. On this supposition, then, in 49,999 cases out of 50,000, half the punishment that is laid on in this way, is laid on in waste.*

2. What has been said with regard to the wife, may, without any very considerable variation, be applied to the children. In this latter case, however, generally speaking, the affection is likely to be more uniform and certain, and consequently the contemplation of the suffering they may be exposed to more certainly efficacious, in restraining the commission of the act intended to be guarded against. The same method, making due allowance on this score, will therefore apply to this, as to the preceding case.

What follows from this, therefore, is, that till the whole stock of direct punishment be exhausted upon the offender himself, none ought in this way to be attempted to be applied through the medium of the innocent.

If there be any case in which forfeiture can be employed with advantage, it would be that of *rebellion*—rebellion, not treason; for treason is a name applied to a variety of offences that have nothing in common but their name. And if it were employed against the descendants of a rebel, it should not be in the way of transitive punishment, nor in the way of punishment at all, but as a measure of self-defence—of self-defence against the mischief that might be expected, not from the criminal, who is no more, but from his dependants. When the husband is engaged in rebellion, it is probable that the

property was his, but also to whatever was either my grandfather's or my uncle's. So also, if my grandfather commit a felony, I lose the chance of succeeding, not indeed to the property that was my father's, but, however, to whatever was either my grandfather's or my uncle's, or any descendant of my uncle's.

* It will not, it is hoped, be understood that any stress is meant to be laid upon the particular number here employed: the reader may put in numbers for himself: they are merely given as a specimen of the manner in which such an inquiry ought to be conducted.

affections of his wife* are enlisted on the same side. Is it certain? By no means. But, however, it is probable. Is it probable that so also are his children? Is it certain? By no means. All rebellions, and particularly the last Scotch rebellion, afford instances to the contrary. But, however, it is probable. What, then, should be done? Presume guilt, and make it require an effort to exempt the party from the consequences? No; but presume innocence, and make it require an effort on the part of the crown to afflict him. Let the crown be empowered, immediately upon the attainder of a rebel, to seize into its hands the possessions, real as well as personal, of his wife, his children, and his other descendants too; with a power to continue the seizure from year to year upon special mention of each person, in so many proclamations to be issued for that purpose: and this too, under whatever title such property may be held, without suffering the law, as it is now, to be turned into a dead letter, by expedients for giving to property such modifications as render it unforfeitable. This would be a remedy exactly analogous to the suspension of the *Habeas Corpus Act:* putting the near kindred of a convicted rebel upon the same footing, with respect to their fortunes, which by that act all men without distinction are put upon, with respect to their liberties. This would be a certain, not a casual safeguard, giving strength to the government, without bringing guiltless oppression upon the people.

State crimes, with treason at the head of them, may issue from various sources: from indigence, from resentment, from ambition; but in many instances they are crimes of conscience. By lawyers in this country, it is spoken of as one of those almost incredible abominations, at which nature shudders: like murder, not to be committed by any man, but one who has sold himself to the devil. They see not, or would not seem to see, that the character of rebel, or of loyalist, turns upon the accidents of war; that men may differ with the most perfect integrity, and with the purest intentions, about the title to the crown, or to such a branch of public power, as well as about a town, or a piece of land; and that it is only party prejudice that makes rebellion and wickedness synonymous. But in those difficult and distracted times, when right and duty are liable to be confounded, the Hydes, the Falklands, the Seldens, and the Hampdens, divide themselves: who can read the recesses of their hearts? Men enlist from pure motives in the worse, and from sordid in the better cause. Now, when conscience is the motive, it is always probable that the same conscience which governs the principal may govern the dependants, or in other words, the same that governs the husband and the father, may govern the wife whom he cherishes, and the children whom he educates. Rebellion, then, is a family offence.

That treason, however, which consists in secretly conspiring in a united nation with a foreign enemy, stands upon a very different footing. This is always among offences against conscience; it can scarcely arise even from personal resentment: it arises from the most sordid of all sources—lucre. Every one acknowledges the baseness of such a crime; and a man could scarcely be more detested by the public at large, than he would be if discovered by his own family. This is no more a family offence than robbery or murder are family offences. In this kind of offence, therefore, there is not the same reason for casting the family upon the mercy of the crown. Whatever the family suffers is endured without reason and in waste.

§ 6. *Disadvantages of this Mode of Punishment.*

1. From what has been said, except in the above case of rebellion, it will be pretty apparent that in point of *certainty* this mode of punishment is eminently deficient. In by far the greater number of cases in which the offence has been committed, this punishment cannot take place for want of a subject on which to operate. A man who has no wife or children, cannot be punished in the persons of his wife and children. Couple this circumstance with the cases in which the offender will have nothing to forfeit, and it will be found that the punishment will be inoperative in nine hundred and ninety-nine cases out of a thousand. Now a punishment that is good in one case only out of a thousand is good for nothing. Some other punishment, then, must be adopted in its room. This punishment must be as much as is enough in those cases, otherwise there had as good be none. Now then as that punishment serves in all other cases, why may it not in this one? If it be enough in those cases, it is, when added to the particular punishment in question, more than enough in this one. Now then, if it be more than enough, it is misery in waste. It is, therefore, for the most part useless, and whenever it is not useless, it is mischievous.

2. After this, it is saying little to observe, that in respect of *equability* it is not less defective, because, to a man who has no thought about his wife or children, or has taken a dislike to them, it is at least matter of indifference to him whatever may befall

* Those who have read Lord Clarendon's History, will remember what grievous complaints that historian, in speaking of the Duke of Albemarle, makes of the duke's presbyterian wife.

them; in this case, therefore, the punishment of them is so much clear waste.

3. In respect of *frugality*, it is in a very remarkable degree defective: the quantity of evil that it is susceptible of producing is altogether boundless. Consider the chain of domestic connexion, and calculate the number of descendants that a man may have; the suffering communicates from one to another, and destroys the peace of the most extensive families. To produce a direct punishment, which may be estimated as unity, indirect and mis-seated punishment must be created equal to ten, twenty, thirty, a hundred, or perhaps a thousand, &c.

4. It is no less deficient in point of *exemplarity*. What the delinquent himself suffers is known always by the sentence: it is in many cases visible in the execution. The woman or the child who is made to suffer for his crime, languishes in secret and unavailing misery.

5. The punishment thus withdrawn from its natural course, possesses not so much as the advantage of *popularity*; it is directly adverse to the general sentiments of sympathy and antipathy. When the delinquent himself is punished, the public vengeance is satiated, and receives no satisfaction from any ulterior punishment: if he be pursued beyond the tomb, and his innocent family be offered up as victims, feelings of pity are excited; an indistinct feeling accuses the laws of injustice, humanity declares itself against them, and on all sides the respect for the laws is weakened.

§ 7. *Collective Punishments.*

I now come to another case, of which examples are to be met with in the penal dispensations of most countries — that of *collective punishment*, or the punishment of large bodies of men for the delinquencies of a part of them. Under the English law, one instance is the punishment inflicted on a whole corporation for the delinquency of some of its members.

When this mode of punishment is justifiable, it is only on the score of necessity. Now, to prove this necessity, two matters of fact must be made to appear: one is, that the guilty could not be punished without the innocent; the other is, that the suffering of the innocent, when added to that of the guilty, will not, in the whole, compose a mass of evil more than equivalent to the benefit of the punishment.

Of these two matters of fact, the first is easy enough to be judged of; the latter must be left to vague conjecture.

Of the administering this mode of punishment, there are some remarkable instances, both by common law and by statute. The above principles will enable us to form a judgment of the propriety of those several proceedings.

By the common law, it is settled that the privileges of a municipal corporation may be forfeited for the misconduct of the corporators; those privileges which are indiscriminately beneficial to all the persons who are free of the corporation, for the delinquency of the majority of any general assembly of those who form the governing part of it. The power, however, of adjudging such a forfeiture has been very rarely exercised, and the insidious and unconstitutional use that was attempted to be made of it in the reign of Charles II. has cast a stigma on the general doctrine; so that it is not likely to be ever again carried into practice. Such a mode of punishment is plainly unnecessary and inexpedient. The particular delinquents in this way may always be ascertained, and that much more easily and infallibly than in the case of ordinary offences; their acts being, in the very essence of them, public and notorious.

Our own times have exhibited several instances in which punishment, either in reality or to appearance, has been inflicted on a body of men for the misbehaviour of a part of it. I will mention them in their order.

The first I shall mention is the case of the city of Edinburgh, which happened in 1736. A very numerous mob rose up in arms, seized the city guard, possessed themselves of the city gates, and in defiance of the public authorities, put to death a Captain *Porteous*, who lay under sentence of death, but had been reprieved. This outrage occasioned an act of Parliament to be made.* By this act, a particular punishment is inflicted upon the Lord Provost of the town, for the particular neglect he is there charged with: but besides this, a fine is laid on the corporation.

Of these punishments, that on the provost, we may observe, was *in propriam personam*. The fine on the corporation was a collective punishment, falling on as many persons as might find themselves in any shape prejudiced by such fine. Now, the ground of applying this latter punishment was not the absolute impracticability of applying any punishment of the proper kind at all. The provost, as we see, was punished for the negative offence of his neglect. And it appears from another act, which immediately follows that in question, that a number of persons were actually fugitives for the principal offence. By the second act, these fugitives, in case of their not surrendering within such a time, were to suffer death, as were also those who should conceal them. If, then, they never surrendered, they remained fugitives, and were punished by banishment. If they surrendered, the presumption was, that

* 10 Geo. II. c. 34.

they would be punished with the ordinary punishment for the offence of which they were guilty; this punishment, however, was not thought sufficient for so enormous and dangerous an outrage. As a supplement, operating in the way of *ex posto facto* law, this fine upon the corporation was thought of. Now, from such a punishment, considered in itself, it is not probable that any great effects could have been expected. It served, however, to point the moral sanction against the offence, and to help to express, as in the words of the act, the "highest detestation and abhorrence" of the criminal transaction.

In this case, as in that of rebellion, what may be presumed, even though the fact be not capable of being established by evidence, is, that there was a complicity of affection, in virtue of which all the inhabitants joined in endeavouring to protect the offenders from the visitation of the law.

The next statute I shall take notice of in this view is that for punishment of the corruption that prevailed in the borough of *New Shoreham.** A society, calling itself the Christian Society, consisting of a large majority of the electors, had formed itself, and subsisted for several years, for the purpose of selling the seats in Parliament for that borough. On this account, all who were members of that society were, by name, with great propriety, laid under a perpetual incapacitation. So much, considered as a punishment, was a punishment *in proprias personas*. But the proper light in which this measure ought to be considered seems not to have been that of a punishment; for in this light it seems hardly to be justified. If it were a punishment, it was an *ex post facto* punishment, which was the less necessary, as there was already a punishment of the same kind provided by the law; to wit, incapacitation, though it be but temporary. But in truth, by much the greatest part of the efficacy which it was expected to have, was built on another ground: on it, as a measure of anticipation; calculated to prevent an evil which, but for such remedy, it was visibly in the power, and as visibly in the intention, of the parties thus disabled to introduce; viz. a succession of representatives brought in, in this corrupt and unconstitutional way. It was therefore not punishment for an evil past and gone, but self-defence against an evil still impending. Now, the expense at which this benefit was purchased for the community, could not well be less in any instance than in this. The franchise of electorship, like any other branch of public power, is not an usufructuary possession, but a trust; an article of property which a man holds not for his own benefit alone, but for that of the whole community, of which he is himself but one. Those who are in possession of it find means, it is true, of deriving from it a personal benefit to themselves: but this is in direct repugnance to the interest of the community and the end of the institution; so that, with reference to the particular interest of the possessor, it may be truly said, it is of the less value to him the more conscientiously he discharges it. In truth, I see not why, with respect to the possessor himself, it ought to be looked upon as anything.

But the legislature went farther: besides incapacitating the electors there named, who were a majority, but not the whole, it went on and communicated the right of election to all the forty-shilling freeholders within a large district, of which the borough in question was but a part. In doing this, they lessened the right of the innocent burghers who remained.† And as to such part of it, the measure, if it be to be considered as a measure of punishment, must be allowed to have been a punishment *in alienas personas*. Considered in this light, it was not expedient, since it was not necessary; for the innocent not only could be, but actually were, distinguished from the guilty. But in whatever light it may appear, considered with reference to the particular persons subjected to that trifling disadvantage, as a measure of reformation it cannot be too highly praised. It stands as the pattern and ground-work of a great plan of constitutional improvement.‡

* 11 Geo. III. c. 55.

† The punishment, if any, that was thus inflicted on the innocent burghers, consisted in the pain of apprehension that among the new electors would be found some, and perhaps a majority of the whole, who would make an improper use of the power of which they were made partakers.

‡ One thing let me be permitted to mention, which I think would have been an improvement, and would have done all that could be wanting to reconcile the measure to the strict principles of ordinary justice. A part of the electors stood in a meritorious light; they had either the merit to withstand, or the good fortune to escape, the temptation to which their co-electors yielded. Yet by the statute in question, the condition of this meritorious part, so far from being bettered, was rendered worse than it was before. There was a method by which this might, I think, have been prevented, without the least prejudice to the reforming part of the measure, and at the same time a signal encouragement have been held out to conscientious electors. The expedient was a simple one. It was but the adding to the number of votes which each of the sound voters should have under the new constitution, in such manner that the weight of each man's suffrage should bear the same proportion to that of the rest under the new constitution as it had done under the old one. The benefit thus reserved would in such case have told for more than it was in reality. The men, by being only not punished, would have seemed to be rewarded:

§ 8. *Random Punishment.*

Random punishment is the epithet that may be applied to mis-seated punishment, in those cases in which, without previous design, it has fallen upon the innocent by some caprice of the imagination taken up at the moment, when the occasion and the pretence has come for the infliction of it—not so much as even the wretched sort of pretence, which had place in the case of extravasated punishment, having place in the present case.

For the illustration of this modification of mis-seated punishment, we may again refer to the law of forfeiture, to that of deodands, and that of the exclusion put upon testimony, when, for the punishment of an inconjecturable number of innocent persons, through the sides of one delinquent, and by wounds of every imaginable breadth and depth and nature, the fact of his delinquency forms the pretence.

When a man who has a freehold interest in any lands commits an offence, part of the punishment for which is the forfeiture of such interest, and then sells, or mortgages, or in any other manner disposes of that interest, and is afterwards attainted for the offence, the law takes it back from those in whose favour it was disposed of, without deigning to inquire whether they knew anything of his having committed it. An individual commits a secret murder, and sells you an estate: twenty years after he is discovered, prosecuted, attainted. The king, that is, somebody who assumes his name, seizes the estate. If you have devised it, charged it, sold it—if, besides yours, it has passed through fifty other hands, it makes no difference. If it was your wife who had been murdered, it would make no difference: you would lose your wife by the crime, and your fortune by the punishment.

It might be supposed that the law looked upon itself as driven to this expedient by the apprehension of fraudulent conveyances; but this is not the case. In the case of moveable and other personal property, it recognises the practicability of distinguishing fraudulent conveyances from fair: it establishes the latter; it vacates only the former. Yet it is obvious that immoveable property is much less obnoxious to such a fraud than moveable.

With all this the author of the Commentaries is perfectly well satisfied. "This *may* be hard," he says, "upon such as have unwarily engaged with the offender." But what of that? "the cruelty and reproach," continues he, "must lie on the part, *not* of the law, but of the criminal, who has thus knowingly and dishonestly involved others in his own calamities." To one who can reason in this manner, nothing that is established can come amiss. So long as there is the least particle of guilt, not only in him who is punished but in any one else, no law by which punishment is inflicted can be cruel, no law deserving of reproach.

Another instance of random punishment is that of Deodands.

You are a farmer. You employ a waggon. You send your son to drive it: he slips down, is run over and killed. The king, or somebody in his name, is to have your waggon. This is the consolation which the law of England gives you for your loss.

This idea might be improved upon. Let it be a law that when a man happens to break his neck, the people of his parish shall draw lots who shall be hanged to keep him company. The punishment would be greater, but the reason for punishment would be the same.

If, instead of a waggon, it had been a ship that was moving to your son's death, it would make no difference: though the ship were laden with the treasure of the Indies, it would make no difference; the ship and its lading would be the king's.

The source from whence this institution flowed is pretty generally known: but it is not perhaps so generally observed that the institution is not a just consequence, even from the ideas then received. It was established, it is not easy to say how early, but however, in the days of Catholicism. In those days, as soon as a man's soul had left its body, it used to go to a place called Purgatory, there to be broiled for 20,000 years. Now in this life some souls love music, others not. But in that post life which was then to come, all souls were fond of it alike. Luther himself, who ought to know, is positive of it.* Not that all music was to their taste: it was only a particular kind of music, such as only priests know how to sing. But it was not reasonable that priests should sing unless they were paid for it; for the labourer is worthy of his hire. Now when a man died thus suddenly, it was not probable that he should have made any provision by

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they certainly would have been rewarded in point of honour. If a religious attention were constantly to be paid to private subsisting interests, which being temporary may always be provided for at a small expense, reformation would be delivered from much of that opposition which it is at present apt to meet with. One may say to reformers, *serve the whole, but forget not that each member is a part of it.*

Strictly speaking, it is true that the electors have no reason to complain, except as above, upon the occasion of an extension of the elective franchise. The dilemma is clear: if you do not mean to discharge it conscientiously, you ought not to be trusted with it; if you do, it is of no benefit to you, and you can have no ground to complain of its being taken from you for the benefit of the State.

* See Sir J. Hawkins' History of Music.

his will for paying them. Therefore it was necessary that somebody else should pay them. So far was in order. But why resort to any other fund than the man's own property? Was he the poorer for having died a violent death, than if he had died a natural one? or for dying by the effect of a thing in motion, than if he had died by a fall from a thing at rest? And if, after all, he had nothing to pay for himself, could not the parish, or the hundred, or the next abbey, have paid for him?

I would not swear but the sages who invented this notable institution might think to do a spite to the thing, the waggon, the ship, or whatever it was, by making it forfeited; as the Athenians exterminated a stone that struck a man and killed him, that is, carried it out of their country and threw it into another. Many a public institution, which the lawyer admires with humble deference, has had no better ground.

The next instance of random punishment which I would give, consists in the exclusion put upon testimony.

I could wish to give the reader a precise list of the offences to which this punishment is annexed, but this I find to be impossible. Every principle delivered on this subject teems with contradiction. The enumeration which is sometimes made includes nearly every principal crime, comprehending treason, perjury, forgery, and *such like crimes*, theft, all crimes considered infamous, and felony. As to felony, this is spoken of as if it were a particular species of crime: the case is, that felony is a collection of crimes as heterogeneous as can be conceived, and which have nothing in common between them but the accidental circumstance of being punished with the same punishment. Crimes of mere resentment, or malicious mischief, are by scores of statutes made felonies. Homicide intentional, in the heat of passion; or unintentional, by an unlucky blow, is felony: rape is felony: crimes of lewdness are felonies. What is not felony? The evidence of persons excommunicated is not received: the reason annexed by some has been, that these individuals, not being under the influence of religion, cannot be believed on their oath. By others it has been generally said, that those who converse with excommunicated persons are excommunicated with them, and consequently they cannot be admitted to receive any questions from a court of justice. Of this nature are the reasons frequently given for existing laws in the books of English jurisprudence.

Without longer stopping, therefore, to ascertain in what cases testimony is refused, let us proceed to examine if this be a proper punishment; that is to say, if there be any case in which, because a man has committed a crime, his testimony ought to be rejected.

The only reason there can be for rejecting a witness is this, that it appears more probable that after every expedient that can be put in practice to get the truth of him, the account he gives of the matter would rather mislead those who are to judge, than set them right. I say mislead the judges; I do not say be a false one: for whether it be true or not, is what to the purposes of justice is a matter of indifference. The point is for them to (be enabled to) form such a notion of the fact in dispute as shall prove a true one: by what means they come at it is no matter. He would commit perjury indeed; but that is quite another evil, and an evil for which there is another and more proper remedy than that of prematurely repelling his evidence. This want of veracity, therefore, is no objection to him, unless he has the faculty of maintaining to the last, such a degree of consistency and plausibility as shall enable him to conceal it.

As to want of veracity, it should be considered that the greatest liar in the universe rarely swerves from truth (I mean what to him seems truth) in one instance out a hundred. The natural bent of all mankind is to speak truth: it requires the force of some particular interest, real or imaginary, to overbalance that propensity. Some men, it is true, are made to deviate from it by very slender motives, but nobody tells a lie absolutely without a motive.

Now then, do but suppose him absolutely without any interest to give a false account, and the most abandoned criminal that ever was upon the earth might be trusted to as safely as the man of the most consummate virtue. Where, then, lies the difference? In this, that the profligate man may easily be made to fancy he has such an interest in telling falsehood, as shall preponderate over the interest he fancies he has in speaking truth; the easier, the more profligate he is: the man of virtue, not without difficulty: the more difficulty, the more he is confirmed in virtue.

Now a motive to speak truth, in cases where he is called upon by law to give his testimony, is what every man has, and unless he be insane, must conceive himself to have: he has it from the political sanction, in the penalties which the law denounces against falsehood in such cases: he has it from the moral sanction, in the infamy annexed by men in general to such a conduct: he has it from the religious sanction, unless he be an atheist, and except in as far as dispensations or absolutions may intervene to take it off.

The interest which a man may have, on the other hand, to speak falsehood in such a case, may be distinguished into a natural interest, and an artificial one. What I mean by a natural interest need not be explained. I call

that an artificial interest, which he may derive in the way of reward, by the express act of him who has some natural interest. If you are at law for an estate, you have a natural interest in my telling any story, true or false, that may serve to establish your title. If you give me a reward for telling such a story, I have an artificial one, which is raised up in me by you.

Now, whether a man have a natural interest or no in the fate of a contest, is in general pretty easy to be known; it is a question of itself: and if determined in the affirmative, the tendency of the law is, to reject a man as a witness, upon that distinct ground, and without regard to his probity or improbity.

The question is here concerning an artificial interest, the existence, or non-existence of which does not so readily lie within proof; but the lights that are to be had, are to be drawn from such circumstances as may appear to affect the description of a man's general character. Thus much only is certain, that in proportion as a man is more or less confirmed in virtue, the less or the more likely is any artificial motive which may be presented to him, to preponderate over the motives he has to speak truth, and be effective, so as to determine him to speak falsehood.

It is here proper to be upon our guard against a vulgar error. Men of narrow experience, of hasty judgment, and of small reflection — in a word, the bulk of mankind, have in a manner but two classes in which to stow a man, in respect of merit: they know but of two characters, the good man and the bad man. If, then, they happen to view a man's conduct, in any instance, in a favourable light, up he goes among the good men; if in an unfavourable, down he goes among the bad men; and they fix a great gulph between the two. If their opinion, with respect to either come to change, as they have no intermediate stages, he is removed from his station, with the same violence as he was at first placed in it. But men of observation and cool reflection, who have had patience and sagacity to make a narrow search into human nature, learn to correct the errors of this indolent and hasty system; they know that, in the scale of merit, men's characters rise one above the other, by infinite and imperceptible degrees; and, at the same time, that the highest is distant from the lowest, by a much less space than is commonly imagined.

Those who admit the truth of these observations will see how precarious and ill-contrived a means the law takes to come at truth, by giving into the error above noticed; by making one class of men which it will hear, and another of men whom it will not suffer to be heard in any case, or on any account. In a word, (for this is the sum of the argument) they will see, that while the law enjoins the exclusion of any class of persons, at all events, in order to avoid a *small* degree of *possible* inconvenience, it embraces a *great* degree of *certain* inconvenience.

It is manifest, that the smaller the number of persons is whom it guards against, in proportion to those from whom it remains still exposed to danger, the less is the advantage gained by it. Whom, then, does it guard against? a few hundreds, perhaps, in a nation. And from whom does it remain exposed to danger? the rest of the nation. For who is it from whom it does not stand exposed, in any case, to a danger of this kind, I declare is more than I can imagine. If there be any man now living that can lay his hand upon his heart, and solemnly declare, that in no instance, trivial or important, has he ever departed from the rigid line of truth, upon the prospect of advantage, he has either more hypocrisy than I would wish to impute to any man, or more virtue than I can persuade myself to exist in any man. The only person about whom I can be sure, and who yet would not willingly yield the palm of integrity to any one that lives, nor barter any atom of it for any other honour the world has to bestow, is far, I know, from the thoughts of making any such pretensions.

There are cases in which the best man alive could scarcely be credited without danger: there are cases in abundance, in which the worst man alive might be believed with safety. Such are all those, where the circumstances of the case afford the witness no natural motive to speak falsely; and the circumstances of the parties are such as can afford him no artificial one. I am, for instance, as bad a man as, for the supposition's sake, you would choose to have me. I happen to see one man beating another, who afterwards seeks his remedy at law against the oppressor, and calls me as a witness, and the only witness. Now it has happened, that I have been convicted of perjury, over and over again, as many times as you please: I would swear my father's life away for a penny. But the parties are, both of them, miserably poor; they neither of them have a penny to tempt me with. What, then, is there to induce me to give a false account of the matter? nothing. What, then, is the danger of admitting me? none at all. What the consequence of rejecting me? the triumph of oppression. Now, in a case like this, there is nothing singular nor improbable; a thousand such might a man figure to himself with ease.

Having proceeded thus far, I will venture to advance this position, that a man's testimony ought not to be rejected at all events, even for the crime of perjury: if not for perjury, it will follow, *à fortiori*, not for any

other crime. I will just offer a farther consideration or two, in support of this opinion; I will then give a short sketch of the evil consequences that result from such an absolute rejection; I will, thirdly, offer an expedient, which, I think, would answer every good purpose of it; and, lastly, I will state the different degrees of reason there may be for extending the incapacity to the different crimes that may be proposed.

Now, then, let the crime of which the witness has been convicted be that of perjury. He has, however, no natural interest to speak false: if he have, that forms another ground of disability, which is not here in question. If, then, he have an artificial interest, it is the party that must give it him. But in this case, the party must be a suborner: unless, then, he stand already convicted of subornation on a former occasion, there can be no ground for repelling the perjured witness, without peremptorily attributing to another man, whose character stands unimpeached, a crime of a similar complexion — a supposition which no rule, either of law or reason, seems to warrant.

I cannot help thinking, that these rules of peremptory incompetency would never have been laid down, had those who first started them gone deliberately and circumspectly to work, and carefully examined the consequences on both sides of the question. The evil consequences of the rule, they seemed scarcely to have cast their eyes on. They seem to have gone to work, as if they had witnesses enough in every case to pick and choose out of; on which supposition, certainly, they would do well to discard the worst, to pick out and retain none but the best, and such as should be proof against all exception. All this was mighty well, provided there was no danger on the other side. But the danger on the other side is terrible. It is a truth, however, which I can scarce help looking upon as very obvious, and certainly it is an important one, that to mark any man out as disabled from witnessing at all events, is to grant all men a license to do to him and before him all manner of mischief whatsoever. Now, as to what may be done *to* him, that indeed may be taken as so much punishment of the proper kind, though it would be a strange, loose, and inconsiderate method of laying a man under proscription.*

But as to mischief that may be done to others in his presence, or which, in any other way, others may suffer for want of his evidence, — the case of Pendoch and Mackendar† may serve as an example. By the statute which is called the Statute of Frauds and Perjuries, three witnesses are necessary to a will of land. In this case, the will had three witnesses, as it ought to have. Two stood unimpeached; but it was found out that the other, once upon a time, had been convicted of petty larceny, and been whipt. This was before the attestation — how long, it does not appear. The suit was commenced five years afterwards. This man being deemed a bad witness (and as such, not to be heard,) there wanted the requisite number, and the man, in whose favour the will had been made, lost the estate. One may imagine the shock to a person, who thought he had all the security for his estate which the law could give him; one may imagine the surprise and indignation the testator, were he to arise out of his grave, must feel, at seeing his disposition vacated by an incident, which common prudence could never have prompted him to guard against, unless, by looking in a man's face, he could have told that once in his life he had been guilty of a trifling breach of honesty, and been whipt for it.

The limits of this design will not permit me to expatiate upon this subject any further, by suggesting cases of like mischief that are liable to happen, or collecting such as are known actually to have happened. This general sketch of them being given, the intelligent reader will readily excuse me from entering into the detail.

Because a woman has been guilty of perjury, or any other offence which has rendered her testimony inadmissible, it is just that she should be punished; but is it just, is it proper, that she should be delivered over to the lust of every man to whom her beauty may become an object of desire? If the law were known to be, in this respect, as it is said to be, the nation would become a scene of lust, cruelty, and rapine; but it happens here, as it will sometimes happen in other instances, one mischief operates as a palliative to another: the extreme absurdity of the law is veiled by men's utter ignorance of its contents.

Let us turn back and look on the other side. What, then, would be the mischief of admitting the testimony of a man thus stigmatized? I see none: none at least that can for a moment stand in competition with the mischief on the other side. "But the person so stigmatized does not deserve to be believed!" Does he not? why am I to think so? because you say so? No; but because men in general will say so too! And will they then? Yes, surely will they. I do believe it, and therefore it is I say there is no danger. Let him be known for what he is, and a jury will be under the strongest bias not to believe him. Their prejudice will bear strong against him; nor will any thing less than the strongest degree of probability, and the most perfect consistency in the whole

* It would be worse, in some respects, than forfeiture of reputation.

† 2 Wils. 18.

narration, be sufficient to induce them to believe it. I see not what it is that should justify the extreme distrust which judges have shown of juries in establishing this rule; especially as, in case of a conviction of an innocent person, which is the greatest danger the case is open to, it is so entirely in the power of the judge to save the convict. The general prejudice of mankind, as we have before observed, leads them to exaggeration in the judgment they pronounce of the general tenor of a man's character from a single action; in particular, to spread the stain that a single act of delinquency brings upon a man's character, farther than, according to reason, it ought to go. It is from having been the dupes, as I take it, of this prejudice, that even judges — the ancient judges who first laid down the law upon this point, first broached this rule. It may always be expected to work, at least as strongly as it ought to work, upon juries taken from the body of the people.

Were it then abolished, the conduct of juries then, you think, would nearly be the same as if it subsisted? I think it probable. What advantage, then, would you gain by the abolition? This great one: the chance that a delinquent might have of impunity in such a case, would no longer be visible upon paper; he would no longer see a formal licence given him, by the letter of the law, to commit all manner of wickedness in presence of an object circumstanced like the party in question: if a guilty person were acquitted upon that ground, it would appear as if, upon the whole, the story was not credible, and that, in fact, no such crime was committed as was charged; not that, having been committed, it was suffered to go unpunished. This, then, is the advantage; and I think a more conclusive one cannot well be required to justify any institution.

All that prudence requires in such a case is, that the character of the witness, that is to say, the offence of which he was formerly guilty, should be known, that those who are called upon to weigh his testimony may be able to judge how far he is to be believed.

Suppose the party has been guilty of perjury: this crime most particularly affects his credibility. There is a great difference to be observed in the quality of the crime when committed in self-defence, in one's own cause, and when committed on the subornation of a stranger, and in an attack upon the life of an innocent person. Such distinctions are most important, and readily offer themselves to those who consult the dictates of common sense, and do not suffer their eyes to be blinded by the mist of technical jargon.

The time which has elapsed since the offence was committed, is a consideration of importance. A man in his youth, at fourteen or fifteen years of age, was led to take a false oath, and was convicted: he becomes reformed; during thirty or forty years he maintains an unimpeachable character. His reformation is of no consequence: the record of his forgotten crime is dragged from the dust with which it had been covered; in accordance with this rule, his testimony must be rejected: upon every principle of common sense and of utility, it would have been equally admissible with any other.

In the prosecution of criminals, the testimony of those who have a manifest interest in their condemnation is not refused, whether that interest be pecuniary, or arising from a desire of vengeance. Such testimony is, however, received with distrust and caution. This is well; — be equally distrustful of a witness, whose previous conduct has rendered him suspected; but hear him, and examine whether the circumstances of his crime are of a nature to affect his credibility on each particular occasion.

§ 8. *Cause of the Frequency of Mis-seated Punishment.*

As to the cause of the abuse thus made of punishment, it lies not very deep below the surface. It lies partly in the strength of the self-regarding and dissocial passions; partly in the weakness of the intellectual faculties on the part of legislators, and of judges acting in the place of legislators.

It lies more particularly in the strength of the dissocial passions, and in that one of the false principles, rivals to the principle of utility, viz. in the principle of sympathy and antipathy, in the production of which the dissocial affections, influenced and swollen to that pitch in which they assume the name of passion, have so large a share.

Urged on by the dissocial passion of antipathy, misguided by the principle of sympathy and antipathy, men in power have punished, because they hated; taking as a sufficient warrant for the infliction of the sufferings which they proposed to themselves to inflict, the existence of that hatred, of which, as towards the person in question, in consideration of the act in question, the existence was demonstrated to them by their own feelings.

That which was the cause, became naturally the measure of what was done: punishing, because of his hate, it was, to the man with the strong hand, matter of course to punish in proportion to his hate.

A lot of punishment, in which so much suffering, and no more, would fall upon the innocent, as, consistently with the application of punishment to the guilty, was unavoidable, sufficed not for the gratification of his hate: of that satisfaction which consists in his contemplation of another's suffering, he would have as much more as was to be had; and

frequently there was scarce a price, so as it was at the expense of others only that that price was made up, and not any part at his expense — there was scarce a price at which he was not content to purchase it.

BOOK V.

OF COMPLEX PUNISHMENTS.

CHAPTER I.

INCONVENIENCES OF COMPLEX PUNISHMENTS.

WE have before observed, that a penal act is not simple in its effects, does not produce one single evil; that it produces many masses of evil at once. A punishment, considered as an act, may be simple — considered in its effects, complex.

A man is imprisoned: here is a simple punishment, as respects the act on the part of the judge; but as respects the individual, the evils resulting from it may be very various, affecting, in different ways, his fortune, his person, his reputation, and his condition in life.

A simple punishment is that which is produced by a single act of punishment; a compound punishment is that which requires more than one operation. The punishment for an offence may include imprisonment, a fine, a mark of infamy, &c.: if all these are announced by the law — if each of these punishments is expressed by a clear and familiar term, the punishment, though compound or complex, may be a good one.

Improper complex punishments are those of which the integral parts are not known, those which include evils that the law does not announce, which are only expressed by obscure and enigmatical names, which do not exhibit their penal nature in clear characters, and which are only understood by lawyers: of this kind are transportation, felony with and without benefit of clergy, præmunire, outlawry, excommunication, incompetency as a witness, and many others.

Everything which is uncertain, everything which is obscure, offends against the first condition in framing a good law.

The inconveniences attached to complex punishments, when thus defined, are very great, but they may be explained in a few words: the legislator knows not what he does; the subject knows not what is meant by the punishment threatened. It becomes impossible for the legislator to do what is proper in each case; he therefore does either too much or too little: every obscure expression veils from his eyes the nature of the punishment or punishments he employs; he strikes blindfolded, and scatters suffering at hazard. The jury and the judges who witness the inconveniences of the law in each particular case, allow themselves to employ all possible means to avoid them; they usurp the authority of the legislator, and perjury becomes the habitual palliative of his injustice or improvidence.

If the law is executed, what happens? — the judge, in inflicting one useful punishment, is obliged to inflict a multitude of useless punishments — punishments of which the offenders had only an imperfect idea, which produce mischief in pure waste: oftentimes the mischief spreads over persons who are entire strangers to the offence, and the consequences are such, that the legislator would have trembled had he foreseen them.

We have already spoken of incompetency as a witness: we shall now direct our attention to the other punishments above named.

CHAPTER II.

OF TRANSPORTATION.

AMONG the advantages which the North Americans have derived from their independence, there is one which cannot fail to strike every man who has any feeling of national pride: it has saved them from the humiliating obligation of receiving every year an importation of the refuse of the British population; of serving as an outlet for the prisons of the mother country, whereby the morals of their rising people were exposed to injury, by a mixture with all possible kinds of depravity. North America, after having been exposed to this scourge for upwards of a century, no longer serves as a receptacle for these living nuisances: but can any limits be assigned to the moral effects that may have been produced by this early inoculation of vice?

I shall have occasion again to recur to this important topic, when, in speaking of the colony at New South Wales, and of the population now forming there, I shall point out the inconveniences which result from sending thither these periodical harvests of malefactors.

The present object is to show that the system of transportation, as now managed, is essentially different from what it was under the old system, and that, with the change of scene, the punishment itself has in many respects been materially altered: in some respects for the better; in many others for the worse.

Under the old system of transportation to America, power being given for that purpose by Parliament, the convicts destined for transportation were made over by the government to a contractor, who, for the profit to be made by selling their services for the penal

term to a master in America, engaged to convey them to the scene of banishment. To banishment — the banishment prescribed by law—was thus added, in all cases in which the individuals were not able to purchase their liberty, the ulterior and perfectly distinct punishment of *bondage*. But wherever it happened, that, through the medium of a friend or otherwise, the convict could bid more for himself than would be given for his services by a stranger, he was set at liberty in the first port at which he arrived. The punishment was limited, as respected him, to simple banishment: the individual was therefore punished with bondage, rather for his poverty than for the crime he had committed. Thus the most culpable—those who had committed great crimes, and who had contrived to secure the profits of their crimes, were least punished. The minor thieves, novices, and inexperienced malefactors, who had not secured their plunder, bore the double chain of banishment and slavery.

Under the system of transportation to Botany Bay, the whole expense is borne by the government. The governor of the colony always retains an authority over the convicts, and acts as their goaler; he provides them with habitations, employment, and food; they are placed under his sole controul; he may employ them either in public or private works. Hard labour, with some few exceptions, is the lot of all; exemption from it cannot be purchased by money. In this respect, the inequality above spoken of has been greatly corrected, and the punishment having been rendered more certain, is consequently more efficacious.

Transportation to America was attended with another inconvenience: that country presented too many facilities for the return of the convicts. A great number of them availed themselves of these opportunities, and returned to the mother country to exercise their fatal talents with superior skill — some when their terms of banishment had expired, many before that period had arrived. As to the latter, the facility of return was one among the disadvantages attending transportation to America: as to the others, in the eyes at least of those who conceive that the commission of one offence ought not to operate as a forfeiture of all title to justice, this facility of return could not fail to appear as an advantage. On the other hand, the distance of Botany Bay afforded a better security against illegal returns: being situated at the antipodes of Britain, with scarcely any existing commerce when first selected, the return of any of the convict population was an event hardly to be looked for. Whilst, however, a security thus effectual was provided against the return of convicts whose terms had not expired, an equally effectual barrier was raised against the return of those whose terms had expired; and thus, at one stroke, all inferior degrees of this punishment were, in nearly all cases, indiscriminately converted into the highest. Whether such an effect was intended or not, is is needless to inquire; but that such was the effect, is indisputable.

Transportation, under the present system, is a complex punishment, composed, first, of banishment, and second, of hard labour: — banishment, a punishment eminently defective, particularly in respect of its inequality; hard labour, a punishment in itself eminently salutary, but, when connected with banishment, and, as in this case, carried on under every possible disadvantage, failing altogether to produce any beneficial effects.

In order to show how completely adverse the system of transportation to New South Wales is to the attainment of the several objects or ends of penal justice, it will be necessary shortly to recapitulate what those ends or objects are, and then to show, from the accounts which have been furnished respecting the state of the convict population of that colony, in what degree these ends or objects have been respectively fulfilled.

I. The main object or end of penal justice is *example*—prevention of similar offences, on the part of individuals at large, by the influence exerted by the punishment on the minds of bystanders, from the apprehension of similar suffering in case of similar delinquency. Of this property, transportation is almost destitute: this is its radical and incurable defect. The punishment is not seen by—it is hidden, abstracted from, the eyes of those upon whom it is desirable it should operate in the way of example. Punishments which are inflicted at the antipodes — in a country of which so little is known, and with which communication was so rare, could make only a transient impression upon the minds of people in this country. "The people," says an author who had deeply considered the effects of imagination, "the mass of the people make no distinction between an interval of a thousand years and of a thousand miles." It has been already said, but cannot be too often repeated and enforced, that the utility and effect of example is not determined by the amount of suffering the delinquent is made to endure, but by the amount of apparent suffering he undergoes. It is that part of his suffering which strikes the eyes of beholders, and which fastens on their imagination, which leaves an impression strong enough to counteract the temptation to offend. However deficient they may be in respect of exemplarity, the sufferings inflicted on persons condemned to this mode of punishment are not the less substantial and severe: confinement for an unlimited time in prisons or

in the hulks — a voyage of from six to eight months, itself a state of constant sufferance from the crowded state of the ships and the necessary restraint to which convicts are subjected — the dangers of the sea — exposure to contagious diseases, which are often attended with the most fatal consequences. Such are some of the concomitants of the system of punishment in question, which serves as the introduction to a state of banishment and bondage in a distant region, in which the means of subsistence have been extremely precarious, and where, by delay in the arrival of a vessel, the whole colony has been repeatedly exposed to all the horrors of famine. It is scarcely possible to conceive a situation more deplorable than that to which the convicts thus transported have been exposed. Constant hard labour, and exposure to depredation, (if they have anything of which they can be plundered,) and occasional starvation, without the means of mending their condition while they remain there, without the hope of ever leaving it: such has been the condition to which persons banished to this colony, for periods that in pretence were limited, have found themselves exposed. Here, then, is punishment, partly intentional, partly accidental, dealt out with the most lavish profuseness; but compared with its effects in the way of example, it may be considered as so much gratuitous suffering, inflicted without end or object. A sea of oblivion flows between that country and this. It is not the hundredth, nor even the thousandth part of this mass of punishment, that makes any impression on the people of the mother country — upon that class of people who are most likely to commit offences, who neither read nor reflect, and whose feelings are capable of being excited, not by the description, but by the exhibition of sufferings. The system of transportation has, moreover, this additional disadvantage, which not merely neutralizes its effects in the discouragement of offences, but renders it, in many cases, an instrument of positive encouragement to the commission of offences: A variety of pleasing illusions will, in the minds of many persons, be connected with the idea of transportation, which will not merely supplant all painful reflections, but will be replaced by the most agreeable anticipations.* It requires but a very superficial knowledge of mankind in general, and more especially of the youth of this country, not to perceive that a distant voyage, a new country, numerous associates, hope of future independence, and agreeable adventures, will be sufficiently captivating to withdraw the mind from the contemplation of the painful part of the picture, and to give uncontrouled sway to ideas of licentious fascinating enjoyment.

II. The second end or object of punishment is *reformation* — prevention of similar offences on the part of the *particular individual* punished in each instance, by taking from him the *will* to commit the like in future. Under this head, what has been done in the colony of New South Wales? By referring to facts, we shall find, not only that in this respect it has been hitherto radically defective, but that, from the nature of things, it ever must remain so.

Connected with the system of transportation to the American colonies, there were two circumstances highly conducive to the reformation of the convicts transported: their admission, upon landing in the country, into families composed of men of thrift and probity; their separation from each other.

When a master in America had engaged a convict in his service, all the members of the family became interested in watching his behaviour. Working under the eye of his master, he had neither the inducements nor the means of giving loose to his vicious propensities. The state of dependence in which he was placed gave him an obvious interest in cultivating the good-will of those under whose authority he found himself placed; and if he still retained any principle of honesty, it could scarcely fail to be invigorated and developed under the encouragement that it would find in the society with which he was surrounded.

Thus it was in America. How is it in New South Wales? To receive the convicts upon their landing, a set of brutes in human shape, a species of society beyond comparison less favourable to colonization than utter solitude — few other inhabitants, but the very profligates themselves, who are sent by thousands from British goals, to be turned loose to mix with one another in this desert—together with the few taskmasters who superintend their work in the open wilderness, and the military men who are sent out with them, in large but still unequal numbers, to help to keep within bounds the mischief they would otherwise be sure to occupy themselves with when thus let loose. Here, then, there were not, as in America, any families to receive the convicts, any means of constantly separating them from each other; no constant and steady inspection. *Field-husbandry* is, under this system, the principal employment; hence general dispersion—field-husbandry carried on by individuals or heads of families, each occupying a distinct dwelling, the interior of which is altogether

* Not many years ago, two young men, the one about 14, the other about 16 years of age, were condemned, for a petty theft, to be transported. Upon hearing this unlooked for sentence, the youngest began to cry. "Coward," said his companion, with an air of triumph, "who ever cried because he had to set out upon the grand tour?" This fact was mentioned to me by a gentleman who was witness to this scene, and was much struck with it.

out of the habitual reach of every *inspecting* eye. It is true that the police officers occasionally go their rounds to maintain order and keep the convicts to their work: but what is to be expected from a system of inspection at long intervals, and which is as disgusting to the inspectors as to the inspected? Can this be regarded as a sufficient check against sloth, gaming, drunkenness, incontinence, profaneness, quarrelling, improvidence, and the absence of all honourable feeling? Immediately the back of the inspector is turned, all the disorder which his actual presence had suspended, is renewed. It may easily be imagined how completely all controul may be set at defiance by a set of men who have regularly organized among themselves a system of complicity, and who make it a matter of triumph and agreeable pastime to assist each other in escaping from inspection.

On this subject, the public have long been in the possession of a very valuable document: it is a complete history of the first sixteen years since the establishment of this colony, which, in respect of fidelity, possesses every title to confidence, and which states the events as they happened, in the form of a journal, accompanied with the necessary details. What gives the work the highest claim to confidence is, that the historiographer is also the panegyrist, the professed panegyrist of the establishment—a character which, when accompanied, as in this instance, with that candour and those internal marks of veracity, with which it is so rare for it to be accompanied, renders the testimony, in this point of view, more than doubly valuable.

The general impression left by a perusal of this work is one of sadness and disgust: it is a history of human nature in its most degraded and depraved state—an unmixed detail of crimes and punishments;—the men constantly engaged in conspiracies against the government, always forming plans for deceiving and disobeying their taskmasters, forming among themselves a society of refractory and wily profligates—a society of wolves and foxes;—the women, everywhere else the best part of humanity, prove in New South Wales a remarkable exception to this general rule. The late chief magistrate says, "The women are worse than the men, and are generally found at the bottom of every infamous transaction that is committed in the colony."* His work abounds with passages to the same effect. Of such materials is it that the foundation of the colony is formed. From such a stock, and under such auspices, is it that the rising generation is to be produced.

The historian has not confined himself to vague imputations of general immorality and profligacy, but has particularized the acts of delinquency on which those imputations rest. The crimes that are committed at New South Wales, in spite of the alertness of the government and the summary administration of justice, surpass, in the skill and cunning with which they are managed, every thing that has been ever witnessed in this country. Almost every page of his work contains the description of offences against persons, or against property, either of individuals or of the public. Gaming and drunkenness produce perpetual quarrels, which usually end in murder. The crime of incendiarism is there practised to an extent altogether unexampled in any other country. Churches, prisons, public and private property, are all alike subjected to the devouring element, without any regard to the extent of the loss that may be occasioned, or the number of lives that may be sacrificed. "When the public gaol was set on fire," says the historian, "it will be read with horror, that at the time there were confined within the walls twenty prisoners, most of whom were loaded with irons, and who with difficulty were snatched from the flames. Feeling for each other was never imputed to these miscreants; and yet, if several were engaged in the commission of a crime, they have seldom been known to betray their companions in iniquity."† The bond of connexion is not sympathy for each other, but antipathy to the government, the common enemy. For the natives they manifest as little feeling, as towards each other. Spite of the rigour of the law, these European savages are guilty of the most wanton acts of barbarity towards the natives of the country; instead of cultivating a good understanding with them, which might have been attended with many advantages, they have converted them into the most determined enemies.

So far from exhibiting any symptoms of reformation, the longer they are subjected to the discipline of the colony, the worse they become. Whatever may be the degree of viciousness ascribed by the historian to the convicts during the continuance of their term, they appear in his history to be in a certain degree honest, sober, and orderly, in comparison with those whose term is expired, and who afterwards become settlers: they then become the prime instigators of all the crimes committed in the colony, and constitute the principal source of the embarrassment to which the government is subjected.

In proof of this assertion, the historian furnishes a most satisfactory piece of evidence. During the first five years subsequent to the establishment of the colony, and when there were no convicts whose terms had expired, the conduct of the convicts was in general orderly, and such as to give hopes of a disposition to reformation: but in proportion as, by the expiration of their respective terms,

* Collins, vol. ii. p. 218.

† Collins, vol. ii. p. 197.

the number of the emancipated colonists increased, the most ungovernable licentiousness was introduced: not only those that were thus recently emancipated, as if to make up for the time they had lost, abandoned themselves to every species of excess, but they encouraged the natural viciousness of those who still remained in a state of bondage.—The convicts finding among these independent settlers, who were their old companions and associates, receivers of stolen property, and protectors from the punishments denounced by the law, always ready to receive them in their retreat from justice, and to conceal them from detection, became more insolent and refractory, anxiously waiting for the time when they also would be entitled to assume this stage of savage independence.

What possible means can be devised to neutralize this perpetually increasing influx of vice? All the expedients that have hitherto been employed have proved completely fruitless, and there would be no difficulty in showing that so they must ever be. Instruction, moral and religious, seems almost altogether vain: the very nature of the population bids defiance to the establishment of an effectual system of police, or to an uniform administration of the laws: *rewards* were found as inefficient as good-will in procuring evidence: the enormous consumption of spirituous liquors, the principal cause of all the disorders in the colony, has, from local circumstances, hitherto been found altogether irrepressible. Under each of these heads a few remarks may suffice.

With respect to religious instruction, little could be expected from two or three chaplains for a colony divided into eight or ten stations, each to appearance at too great a distance from the rest to send auditors to any other. To minds so disposed as those of the convicts, of what advantage was the attendance on divine service for one or two hours on one day in the week? And with what profit could religious instruction be expected to be received by men who were "*made* (as the historian expresses it*) to attend divine service?" To rid themselves of the occasional listlessness they were thus *made* to endure, the church was got rid of by an incendiary plot. To punish them (if by accident another building fit for the purpose had not been already in existence) they were to have been employed on the Sunday in the erecting another building for the purpose.† To work on Sunday they might be made; but will they ever be made to lend an attentive ear and a docile heart to authorative instruction? Even the women, says the historian, were extremely remiss in their attendance on divine service, and were never at a loss for mendacious pretences for excusing themselves. In short, instead of being observed as a day dedicated to religious duties, Sunday appears in that colony to have been distinguished only by the riot and debauchery with which it was marked—those who did not attend divine service, taking advantage of the absence of those who did, to plunder their dwellings and destroy their crops.

It has just been seen with how very sparing a hand religious instruction for the Protestant part of the establishment was supplied. For the spiritual instruction of the Catholic part of the colony, which, from the large importations made from Ireland, must now have become very numerous, it does not appear that any provision whatever was made. It is true, that in one of the importations of convicts from Ireland, a priest of the Catholic persuasion, whose offence was sedition, was comprised.‡ If, instead of a seditious clergyman, would not the expense have been well bestowed in sending out a loyalist clergyman of the same religious persuasion?‖

As to the police, it is necessarily in an extreme degree debilitated by the corrupt state of the subordinate class of public functionaries. In a population that warranted the utmost distrust on the part of the government, it was found necessary to restrain the free intercourse between the several parts of the colony. *All persons*, officers excepted, were forbidden to travel from one district of the settlement to another without passports. These regulations proved, however, altogether nugatory: the constables whose duty it was to inspect these passports,§ either from fear or corruption, neglected to do their duty, whilst, as has been already mentioned, a most effectual bar to the preservation of any well-regulated system of police, was found in those convicts whose terms had expired, and who were ever ready to give protection and assistance to the criminal and turbulent.

With regard to all classes of offences committed in this colony, justice was paralyzed by a principle which ensured impunity, and which it seems impossible to eradicate. With the historian, who was also Judge Advocate, it is a matter of perpetual complaint, that it

* Collins, vol. ii. p. 122. † Ibid. p. 129.

‡ Collins, vol. ii. p. 293.

‖ There is a passage in Collins (II. p. 51,) highly characteristic of the light in which the securing the means of attendance, and thence attendance itself on divine worship, on the part of the convicts, was regarded by the constituted authorities. A church-clock having been brought to the settlement in "The Reliance," and no building fit for its reception having been since erected, preparations were now making for constructing a tower fit for the purpose, *to which might be added a church*, whenever at a future day the increase of labourers might enable the governor to direct such an edifice to be built.

§ Collins, vol. ii. p. 139.

was scarcely possible to convict an offender who was not taken in the very act of committing an offence. Evidence was on almost all occasions altogether as inaccessible as if there had been a combination and tacit agreement among the majority of the inhabitants of the colony to paralyze the arm of justice, by a refusal to bear testimony. He speaks of five murders in one year* (1796,) which were left unpunished, notwithstanding the strong presumptions which indicated the guilty parties, because the necessary witnesses would not come forward, even though extraordinary rewards were offered. One such fact is sufficient: it is superfluous to cite others of the same nature.

The most prominent cause of this state of abandoned profligacy, is the universal and immoderate passion for spirituous liquors: it is the exciting cause which leads to every species of vice — gaming, dissoluteness, depredation, and murder. Servants, soldiers, labourers, women, the youth of both sexes, prisoners and their gaolers, are all alike corrupted by it: it was carried to such a pitch, that numbers of the settlers were in the practice of selling the whole of their crops, as soon as they were gathered, in order to purchase their favourite liquor. The attempts made from time to time by the government, to check this practice, have proved altogether unavailing. The policy of the government upon this point appears not to have been quite steady: sometimes it has allowed the trade in spirituous liquors, at other times it has been forbidden. But whatever may be the policy of the government, experience shows, that from the diffusiveness of the population, as well as from other causes, no precautions within its power will ever diminish the quantity of this liquid poison consumed in any part of the colony. The greater the population, and the more distant the stations from the seat of government, the more easy will it be to carry on private distilleries, and to prevent them from being detected. And even if the supply thus produced were unequal to the demand, it would be impossible to prevent smuggling on an extent of coast which the whole navy of England would be unequal to guard. If it were found impossible to restrain this evil when the colony was confined to a single station, and a single harbour, can any better success be looked for now that the settlements are spread wide over the face of the country, when there are numerous settlers constantly employed in the manufacture of this article, and every ship that arrives is provided with an abundant supply, the sale of it being more certain and more profitable than that of any other commodity.

* Collins, vol. ii. p. 4.

Such has been the state of the convict population of this colony — past reformation none — future reformation still more hopeless. We have perhaps dwelt too long upon this part of the subject: fortunately the topics which remain may be compressed into a narrower compass.

III. The third object or end of punishment is *incapacitation* — taking from the delinquent the power of committing the same crimes.

Transportation accomplishes this object, with relation to a *certain place*. The convict, whilst in New South Wales, cannot commit crimes in England; the distance between the two places in a considerable degree precludes his illegal return, and this is the sum of the advantage.

Whilst the convict is at Botany Bay, he need not be dreaded in England: but his character remains the same, and the crimes which are mischievous in the mother country are mischievous in the colony; we ought not, therefore, to attribute to this punishment an advantage which it does not possess. That an inhabitant of London should rejoice in the removal to a distance of a dangerous character, is easily comprehended: his particular interest is touched. But a punishment ought not to meet the approbation of a legislature, which, without diminishing the number of crimes committed, only changes the place of their commission.

The security, great as it may appear to be, against returns both legal and illegal, has not been so effectual as might have been expected. The number of convicts who left the colony between the years 1790 and 1796, the accounts of which are scattered over the whole of Collins' work, amount in the whole to 166, of which 89 consisted of those whose terms had expired, and 76 of those whose terms had not expired. This is, however, very far from being the total amount of either description of those that had quitted the colony, with or without permission. Escapes are in various parts of the work mentioned as being made in clusters, and the numbers composing each cluster not being stated, could not be carried to the above account.

The number of escapes will, most probably, increase as commerce extends, and as the convicts become more numerous, and consequently possess greater facilities for escaping.

IV. The fourth end or object of punishment is the making *compensation* or *satisfaction* to the party injured.

On this head, there is but one word to be said: — The system of transportation is altogether destitute of this quality. It is true, that this objection has no weight, except in comparison with a system of punishment in which provision is made, out of the labour of

the offender, for compensation to the party injured.

V. The fifth end or object proper to be kept in view in a system of penal legislation, is the collateral object of *economy*.

If it could be said of the system in question, that it possessed all the several qualities desirable in a plan of penal legislation, its being attended with a certain greater degree of expense would not afford a very serious objection to it; but in this case, this system, the most defective in itself, is at the same time carried on at a most enormous expense.

Upon this subject, the 28th Report of the Committee of Finance contains the most accurate and minute information. From that report it appears, that the total expense incurred during the ten or eleven first years of the establishment, ending in the year 1798, amounted to £1,037,000, which sum being divided by the number of convicts, will be found to amount to about £46 a-head. A possible reduction is in that report contemplated, which might in time cut down the expense to about £37 per head. To this expense, however, must be added the value of each man's labour, since, if not considered as thrown away, the value ought to be added to the account of expense.

Consider New South Wales as a large manufacturing establishment: the master manufacturer, on balancing his accounts, would find himself *minus* £46 for every workman that he employed.

What enhances the expense of this manufacturing establishment beyond what it would be in the mother country, are—1. The expense incurred in conveying the workmen to a distance of between two and three thousand leagues; 2. The maintenance of the civil establishment, consisting of governors, judges, inspectors, police officers, &c.; 3. The maintenance of a military establishment, the sole object of which is to preserve subordination and peace in the colony; 4. The wide separation of the workmen, their untrustworthiness, their profligacy, favoured by the local circumstances of the colony, and the trifling value of the labour that can be extracted by compulsion from men who have no interest in the produce of their labour; 5. The high price of all the tools and raw materials employed in carrying on the manufactory, which are brought from Europe at the risk and expense of a long voyage.

If it be impossible to find a single clerk in Manchester or Liverpool, who would not have taken all these circumstances into his consideration, in making such a calculation as that in question, and if, after, or without having made it, there is not one man of common sense who would have undertaken such a scheme, a necessary conclusion is, that the arithmetic of those who risk their own property, is very different from that of those who speculate at the expense of the public.

In addition to the evils above enumerated, as attending the system of transportation to New South Wales, the punishment thus inflicted is liable to be attended with various species of aggravation, making so much clear addition to the punishment pronounced by the legislator.

When a punishment is denounced by the legislature, it ought to be selected as the one best adapted to the nature of the offence: his will ought to be, that the punishment inflicted should be such as he has directed; he regards it as sufficient; his will is, that it should not be made either more lenient or more severe: he reckons that a certain punishment, when inflicted, produces a given effect, but that another punishment, if by accident coupled with the principal one, whether from negligence or interest on the part of subordinates, exceeding the intention of the law, is so much injustice, and being nugatory in the way of example, produces so much uncompensated evil.

The punishment of transportation, which, according to the intention of the legislator, is designed as a comparatively lenient punishment, and is rarely directed to exceed a term of from seven to fourteen years, under the system in question is, in point of fact, frequently converted into capital punishment. What is the more to be lamented is, that this monstrous aggravation will, in general, be found to fall almost exclusively upon the least robust and least noxious class of offenders — those who, by their sensibility, former habits of life, sex and age, are least able to contend against the terrible visitation to which they are exposed during the course of a long and perilous voyage. Upon this subject the facts are as authentic as they are lamentable.

In a period of above eight years and a half, viz. from the 8th of May 1787, to the 31st December 1795, of five thousand one hundred and ninety-six embarked, five hundred and twenty-two perished in the course of the voyage; nor is this all, the accounts being incomplete. Out of twenty-eight vessels, in twenty-three of which the mortality just spoken of is stated to have taken place, there are five in respect of which the number of deaths is not mentioned.*

A voyage, however long it may be, does not necessarily shorten human existence. Captain Cook went round the world, and returned without the loss of a single man. It necessarily follows, therefore, that a voyage which

* The mortality attendant upon these first voyages to New South Wales appears greatly to have originated in negligence. Cargoes of convicts have in many latter instances been carried out without a single death occurring.

decimates those that are sent upon it, must be attended with some very peculiar circumstances. In the present case, it is very clear that the mortality that thus prevailed arose partly from the state of the convicts, partly from the discipline to which they were subjected. Allow them to come on deck, everything is to be apprehended from their turbulent dispositions: confine them in the hold, and they contract the most dangerous diseases. If the merchant, who contracts for their transportation, or the captain of the ship that is employed by him, happen to be unfeeling and rapacious, the provisions are scanty and of a bad quality. If a single prisoner happen to bring with him the seeds of an infectious disorder, the contagion spreads over the whole ship. A ship *(The Hillsborough)* which, in the year 1799, was employed in the conveyance of convicts, out of a population of 300 lost 101.* It was not, says Colonel Collins, a neglect of any of the requisite precautions, but the gaol fever, which had been introduced by one of the prisoners, that caused this dreadful ravage.

Whatever may be the precautions employed, by any single accident or act of negligence, death, under its most terrific forms, is at all times liable to be introduced into these floating prisons, which have to traverse half the surface of the globe, with daily accumulating causes of destruction within them, before the diseased and dying can be separated from those who, having escaped infection, will have to drag out a debilitated existence in a state of bondage and exile.

Can the intention of the legislator be recognised in these accumulated aggravations to the punishment denounced? Can he be said to be aware of what he is doing, when he denounces a punishment, the infliction of which is withdrawn altogether from his controul — which is subjected to a multiplicity of accidents — the nature of which is different from what it is pronounced to be — and in its execution bears scarce any resemblance to what he had the intention of inflicting? Justice, of which the most sacred attributes are certainty and precision—which ought to weigh with the most scrupulous nicety the evils which it distributes—becomes, under the system in question, a sort of lottery, the pains of which fall into the hands of those that are least deserving of them. Translate this complication of chances, and see what the result will be: "I sentence you," says the judge, "but to what I know not — perhaps to storm and shipwreck — perhaps to infectious disorders — perhaps to famine — perhaps to be massacred by savages — perhaps to be devoured by wild beasts. Away — take your chance—perish or prosper—suffer or enjoy: I rid myself of the sight of you: the ship that bears you away saves me from witnessing your sufferings — I shall give myself no more trouble about you."

But it may perhaps be said, that however deficient in a penal view, New South Wales possesses great political advantages: it is an infant colony; the population will by degrees increase; the successively rising generations will become more enlightened and more moral; and after the lapse of a certain number of centuries, it will become a dependent settlement, of the highest political importance.

The first answer to this is, if it be thought to require any, that of all the expedients that could have been devised for founding a new colony in this or in any other place, the most expensive and the most hopeless was the sending out, as the embryo stock, a set of men of stigmatized character and dissolute habits of life. If there be any one situation more than another that requires patience, sobriety, industry, fortitude, intelligence, it is that of a set of colonists transported to a distance from their native country, constantly exposed to all sorts of privations, who have everything to create, and who, in a newly-formed establishment, have to conciliate a set of savage and ferocious barbarians, justly dreading an invasion on their lives and property. Even an old-established and well-organized community would be exposed to destruction, from an infusion of vicious and profligate malefactors, if effectual remedies were not employed to repress them: such characters are destitute of all qualities, both moral and physical, that are essential in the establishing a colony, or that would enable them to subdue the obstacles opposed by nature in its rude and uncultivated state.

Where colonization has succeeded, the character of the infant population has been far different. The founders of the most successful colonies have consisted of a set of benevolent and pacific *Quakers* — of men of religious scruples, who have transported themselves to another hemisphere, in order that they might enjoy undisturbed liberty of conscience — of poor and honest labourers accustomed to frugal and industrious habits.†

* Collins, vol. ii. p. 222.

† That New South Wales has, since these papers were written, become a flourishing colony, is owing not so much to convict transportation, but to the admission of free settlers. The evils above pointed out continue to exist, but their influence is lessened by the infusion of honest and industrious settlers.

The following quotation confirms the reasoning of Mr. Bentham, and shows that the greater portion of the evils he points out continue unabated. — *Ed.*

"If convicts are still to be transported hither, the only chance of their reformation consists in scattering them widely over the country, and giving them pastoral habits. Convict transpor-

CHAPTER III.

PANOPTICON PENITENTIARY.

THE plans of Mr. Bentham upon this subject are already before the public: for the purpose of the present work, it will be only necessarily shortly to explain the three fundamental ideas which he lays down: —

I. *A Circular, or Polygonal Building*, with cells on each story in the circumference; in the centre, a lodge for the inspector, from which he may see all the prisoners, without being himself seen, and from whence he may issue all his directions, without being obliged to quit his post.

II. *Management by Contract.* — The contractor undertaking the whole concern at a certain price for each prisoner, reserving to himself the disposal of all the profit which may arise from their labours, the species of which is left to his choice.

Under this system, the interest of the governor is, as far as possible, identified with his duty. The more orderly and industrious the prisoners, the greater the amount of his profits. He will, therefore, teach them the most profitable trades, and give them such portion of the profits as shall excite them to labour. He unites in himself the characters of magistrate, inspector, head of a manufactory and of a family, and is urged on by the strongest motives faithfully to discharge all these duties.

III. *Responsibility of the Manager.* — He is bound to assure the lives of his prisoners. A calculation is made of the average number of deaths in the year, among the mixed multitude committed to his care, and a certain sum is allowed to him for each; but at the end of the year, he is required to pay a similar sum for every one lost by death or escape. He is therefore constituted the assurer of the lives and safe custody of his prisoners; but to assure their lives, is at the same time to secure the multitude of cares and attentions, on which their health and well-being depend.

Publicity is the effectual preservative against abuses. Under the present system, prisons are covered with an impenetrable veil: the Panopticon, on the contrary, would be, so to speak, transparent — accessible, at all hours, to properly authorized magistrates—accessible to everybody, at properly regulated hours, or days. The spectator, introduced into the central lodge, would behold the whole of the interior, and would be a witness to the detention of the prisoners, and a judge of their condition.

Some individuals, pretending to a high degree of sensibility, have considered this *continual inspection*, which constitutes the peculiar merit of Mr. Bentham's plan, as objectionable. It has appeared to them as a restraint more terrible than any other tyranny: they have depicted an establishment of this kind as a place of torment. In so doing, these men of sensibility have forgotten the state of most other prisons, in which the prisoners, heaped together, can enjoy tranquillity neither day nor night. They forget, that under this system of continual inspection, a greater degree of liberty and ease can be allowed — that chains and shackles may be suppressed — that the prisoners may be allowed to associate in small companies — that all quarrels, tumults, and noise, bitter sources of vexation, will be prevented — that the prisoners will be protected against the caprices of their gaolers, and the brutality of their companions; whilst those frequent and cruel instances of neglect which have occurred, will be prevented by the facility of appeal which will be afforded to the principal authority. These real advantages are overlooked by a fantastic sensibility which never reasons.

Let us suppose a prison established upon this plan; and then observe in what manner it contributes to the several ends of punishment: —

FIRST END — *Example.*

It would be placed in the neighbourhood of the metropolis, where the greatest number of persons are collected together, and especially of those who require to be reminded, by penal exhibitions, of the consequences of crime. The appearance of the building, the singularity of its shape, the walls and ditches by which it would be surrounded, the guards stationed at its gates, would all excite ideas of restraint and punishment; whilst the faci-

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tation is at best a bad system of colonization; and Governor Macquarrie, by his preference of the convict to the free, made it worse for the plantation, and totally inoperative as the penalty of felony, or the penitentiary of vice.

"The evils and expense of the transportation system would certainly be lessened by placing the convicts more in the service of farming and grazing settlers, out of the reach of the temptations and evil communications of large towns, the establishment of which was too much the policy of the late Governor. The salutary life of a shepherd or a stockman, would gradually soften the heart of the most hardened convict; but instead of this, Governor Macquarrie's system was to keep them congregated in barracks, and employed, at a ration of a pound and a half of meat and the same quantity of flour per diem, upon showy public buildings. Of wretches possessed of no better means of reformation than these, it could not be expected that industrious colonists should ever be made. When their period of transportation expired, or was remitted by favour, they would therefore take their grant of land and allowances for settling, and sell them the next hour for spirits."—*Journal of an Excursion across the Blue Mountains of New South Wales*, edited by Baron Field, p. 467. Lond. 1825.

lity which would be given to admission would scarcely fail to attract a multitude of visitors. And what would they see?—a set of persons deprived of liberty which they have misused—compelled to engage in labour, which was formerly their aversion—and restrained from riot and intemperance, in which they formerly delighted; the whole of them clothed in a particular dress, indicating the infamy of their crimes. What scene could be more instructive to the great proportion of the spectators? What a source of conversation, of allusion, of domestic instruction! How naturally would the aspect of this prison lead to a comparison between the labour of the free man and the prisoner—between the enjoyments of the innocent, and the privations of the criminal! And, at the same time, the *real* punishment would be less than the apparent:—the spectators, who would have only a momentary view of this doleful spectacle, would not perceive all the circumstances which would effectively soften the rigours of this prison. The punishment would be visible, and the imagination would exaggerate its amount; its relaxations would be out of sight; no portion of the suffering inflicted would be lost. The greater number even of the prisoners, being taken from the class of unfortunate and suffering individuals, would be in a state of comfort; whilst *ennui*, the scourge of ordinary prisons, would be banished.

Second Object—*Reformation.*

Idleness, intemperance, and vicious connexions, are the three principal causes of corruption among the poor. When habits of this nature have become to such a degree inveterate, as to surmount the tutelary motives, and to lead to the commission of crimes, no hope of reformation can be entertained but by a new course of education—an education that shall place the patient in a situation in which he will find it impossible to gratify his vicious propensities, and where every surrounding object will tend to give birth to habits and inclinations of a nature altogether opposite. The principal instrument which can be employed on this occasion is perpetual superintendence. Delinquents are a peculiar race of beings, who require unremitted inspection. Their weakness consists in yielding to the seductions of the passing moment. Their minds are weak and disordered, and though their disease is neither so clearly marked nor so incurable as that of idiots and lunatics, like these they require to be kept under restraints, and they cannot, without danger, be left to themselves.

Under the safeguard of this continual inspection, without which success is not to be expected, the penitentiary house described includes all the causes which are calculated to destroy the seeds of vice, and to rear those of virtue.

1. *Labour.*—It is admitted that constraint, instead of inspiring a taste for labour, is calculated to augment the aversion to it. It must, however, be recollected that, in this case, labour is the only resource against ennui—that being imposed upon all, it will be encouraged by example, and rendered more agreeable by being carried on in the company of others; it will be followed by immediate reward, and the individual being allowed a share in the profits, it will lose the character of servitude, by his being rendered, in some measure, a partner in the concern. Those who formerly understood no lucrative business, will, in this new course of education, obtain new faculties and new enjoyments; and when they shall be set free, will have learned a trade, the profits of which are greater than those of fraud and rapine.

2. *Temperance.*—We have already had occasion to show that nearly all the crimes committed at Botany Bay either originate or are increased by the use of spirituous liquors, and that it is impossible to prevent their use. Here the evil is arrested in its source: it will not be possible to smuggle in a drop of this poison; transgressions will therefore be impossible. Man yields to necessity: difficulties may stimulate his desires, but an absolute impossibility of satisfying them destroys them, when they are not supported by long established habits. There is much humanity in a strict rule, which prevents not only faults and chastisements, but temptations also.

3. *Separation into Classes.*—The Panopticon is the only practicable plan which admits of the prisoners being divided into little societies, in such manner as to separate those whose vicious propensities are most contagious. These associations can hardly fail to afford opportunities for the performance of reciprocal services, for the exercise of the affections, and the formation of habits favourable to reformation. The relation of master and scholar will gradually be formed among them; opportunities will thus be given for bestowing rewards for instruction—for exciting emulation in learning, and the creation of a sentiment of honour and self-esteem, which will be among the first fruits of application. Ideas of improvement and lawful gains will, by degrees, supplant those of licentiousness and fraudulent acquisition. All these advantages arise out of the very nature of the establishment.

Why should not unmarried prisoners be allowed to intermarry? It would operate as a powerful spur to those who aimed at attaining this reward, which should only be bestowed on account of orderly conduct and industry.

These little societies present an additional

security, arising from their mutual responsibility. It is both just and natural to say to them, "You live together, you act together; you were able to have prevented this crime, and if you have not so done, you are accomplices in it." Thus the prisoners would be converted into guardians and inspectors of each other. Each cell would be interested in the good conduct of every one of its members. If any one of them should be distinguished for its good order, some distinction might be bestowed upon it, which should be visible to all. By such means, a feeling of honour might be excited even in the abode of ignominy.

4. *Instruction.*—Indigence and ignorance are the parents of crime. The instruction of those prisoners who are not too old to learn, confers upon them many benefits at once: it affords great assistance in changing the habits of the mind, and elevating them, in their own estimation, from the class of beings who are degraded on account of the inferiority of their education. Different studies may usefully fill up the intervals of time, when mechanical operations are suspended—both prudence and humanity dictating the occupation of those intervals, instead of abandoning to themselves minds to whom idleness is a burthen difficult to bear. But the object is much more important, especially with regard to young offenders, who form the largest proportion of the whole. The prison should be their school, in which they should learn those habits, which should prevent their ever entering it again.

The services of religion ought to be rendered attractive, in order that they may be efficacious. They may be performed in the centre of the building, without the prisoners quitting their cells. The central lodge may be opened for the admission of the public; the worship adapted to the nature of the establishment may be accompanied with solemn music, to add to its solemnity. The chaplain engaged in its performance would not be a stranger to the prisoners: his instructions should be adapted to the wants of those to whom they are addressed: he would be known to them as their daily benefactor, who watches over the progress of their amendment, who is the interpreter of their wishes, and their witness before their superiors. As their protector and instructor, as a friend who consoles and who enlightens them, he would unite all the titles which can render him an object of respect and affection. How many sensible and virtuous men would seek a situation which presents, to a religious mind, opportunities for conquests more interesting than the savage regions of Africa and Canada!

There is, at all times, great reason for distrusting the reformation of criminals. Experience too often justifies the maxim of the poet,

"L'honneur est comme une île escarpée et sans bords:
On n'y peut plus rentrer dès qu'on en est dehors."

But those who are most distrustful and incredulous of good, must acknowledge at least that there is a great difference to be made in this respect, on account of the age of the delinquents and the nature of their offences. Youth may be moulded like soft wax, whilst advanced age will not yield to new impressions: many crimes are not deeply rooted in the heart, but spring up there from seduction, example, and above all, indigence and hunger. Some are sudden acts of vengeance, which do not imply habitual perversity. These distinctions are just, and not controverted. It must also be admitted, that the plan we have described presents the most efficacious means for the amendment of those who have preserved some remains of honest principle.

THIRD OBJECT — *Suppression of Power to injure.*

Whatever may be its effects in producing internal reformation and correcting the will, the Panopticon unites all the conditions requisite for the prevention of the commission of new offences.

Under this head, the prisoners may be considered at two periods — the period of their imprisonment; the period posterior to their liberation.

During the first, suppose them as wicked as you will, what crimes can they commit whilst under uninterrupted inspection — divided by cells at all times sufficiently strong to resist a revolt — unable to unite or to conspire without being seen—responsible the one for the other — deprived of all communication with the exterior—deprived of all intoxicating liquors (those stimulants to dangerous enterprises) — and in the hand of a governor who could immediately isolate the dangerous individual? The simple enumeration of these circumstances inspires a feeling of perfect security. When we recall the picture of Botany Bay, the contrast becomes as striking as it can be rendered.

The prevention of crimes on the part of delinquent prisoners is also in proportion to the difficulty of their escape; and what system affords in this respect a security comparable to that of the Panopticon?

With respect to discharged prisoners, the only absolute guarantee is in their reformation.

Independently of this happy effect, which may be expected in this plan more than upon any other, the liberated prisoners would, for the most part, have acquired, by the savings made for them out of their part of the profit of their labour, a stock which will secure them from the immediate temptations of want, and give them time to avail themselves

of those resources of industry, which they have acquired during their captivity.

But this is not all. I have reserved for this chapter the mention of an ingenious plan, which the author of the Panopticon has proposed as a supplement to this scheme of punishment. He has paid particular attention to the dangerous and critical situation of discharged prisoners, when re-entering the world after a detention, perhaps, for many years: they have no friends to receive them—without reputation to recommend them — with characters open to suspicion; and many times, perhaps, in the first transports of joy for recovered liberty, as little qualified to use it with discretion, as the slaves who have broken their fetters. By these considerations, the author was led to the idea of an auxiliary establishment, into which the discharged prisoners might be admitted when they left the Panopticon, and be allowed to continue for a longer or shorter period, according to the nature of their crimes, and their previous conduct. The details of the plan would be foreign to the present subject. It must suffice to say, that in this privileged asylum they would have different degrees of liberty, the choice of their occupations, the entire profit of their labour, with fixed and moderate charges for their board and lodging, and the right of going and returning, on leaving a certain sum as a security; they would wear no prisoner's uniform, no humiliating badge. The greater number, in the first moment of their embarrassment, whilst they have no certain object in view, would themselves choose a retreat so suitable to their situation. This transient sojourn, this noviciate, would serve to conduct them by degrees to their entire liberty; it would be an intermediate state between captivity and independence, and afford a proof of the sincerity of their amendment; it would afford a just precaution against individuals in whom an immediate and absolute confidence could not be reposed without danger.

Fourth Object — *Compensation to the party injured.*

In most systems of jurisprudence, when a delinquent has been corporally punished, justice is thought to have been satisfied: it is not in general required that he should make compensation to the party injured.

It is true, that in the greater number of cases, compensation could not be exacted of him: delinquents are commonly of the poorer class,—*ex nihilo, nihil fit.*

If they are idle during their imprisonment, far from being able to render satisfaction, they constitute a charge upon society.

If they are condemned to public works, these works, rarely sufficiently lucrative to cover the expense of undertaking them, cannot furnish any surplus.

It is only in a plan like the Panopticon, in which, by the combination of labour and economy in the administration, it is possible to obtain a profit sufficiently great to offer at least some portion of indemnity to the parties injured. Mr. Bentham had made engagements upon this head in his contract with the Ministers. In the prisons of Philadelphia, they levy upon the portion of profit allowed to the prisoner, the expenses of his detection and prosecution. One step more, and they will grant indemnity to the parties injured.

Fifth Object — *Economy.*

To say that, of two plans of equal merit, the most economical ought to be preferred, is to advance a proposition which must appear trivial to all those who do not know that the expense of an enterprise is often its secret recommendation, and that economy is a virtue against which there exists a general conspiracy.

In the contract for the Panopticon, one thousand convicts were to have cost the state £12 per head, without including the expense of constructing the prison, which was estimated at £12,000, and the ground at £10,000; upon which, reckoning interest at £5 per cent., £1 : 10s. ought to be added for the annual expense of each, making the total expense of each individual, £13 : 10s. per annum.

It should be recollected, that at this time the average expense of each convict in New Holland, was £37 per annum, nearly three times as much. Besides, the author of the panopticon assured—

1. An indemnity to the parties injured.
2. He allowed a fourth part of the profits of their labour to the prisoners.
3. He was to make a future reduction in the expense to government.

A new undertaking, like that of the Panopticon, intended to embrace many branches of industry, would not yield its greatest profits at first; it would be expensive at first, and only become profitable by degrees. Time would be required for establishing its manufactories, and for the cultivation of the grounds applicable to the support of the establishment; for forming its pupils, and regulating their habits; in a word, bringing to perfection the whole economy of its system. Mr. Bentham had expressly stipulated for the publicity of his accounts; and if the advantages, as was expected, had become considerable, the government would have been enabled to take advantage of them in obtaining more favourable terms in its subsequent contracts. Mr. Bentham reckoned, from the calculations he had made, and respecting which he had consulted experienced persons, that after a short time the convicts would cost the government nothing.

Laying aside everything hypothetical, it is clear that a penitentiary at home ought to be less expensive than a colonial establishment. The reasons for this opinion have been given when speaking of transportation to Botany Bay.

I have shown the excellence of this plan with reference to all the ends of punishment: it remains to be observed, that it attains its object without producing any of those collateral inconveniences which abound in colonial transportation. There is no prolonged sojourn in the hulks — none of the dangers of a long sea voyage — no promiscuous intercourse of prisoners — no contagious sickness — no danger of famine — no warfare with the savage natives — no rebellions — no abuse of power by the persons in authority — in short, an entire absence of the accidental and accessory evils, of which every page of the history of the penal colony affords an example. What an immense economy in the employment of punishment! It will no longer be dissipated and lost upon barren rocks, and amid far distant deserts: it will always preserve the nature of legal punishment — of just and merited suffering, without being converted into evils of every description, which excite only pity. The whole of it will be seen: it will all be useful; it will not depend upon chance; its execution will not be abandoned to subordinate and mercenary hands; the legislator who appoints it, may incessantly watch over its administration.

The success which may be obtained from a well-regulated penitentiary is no longer a simple probability founded upon reasoning. The trial has been made; it has succeeded even beyond what has been hoped. The quakers of Pensylvania have the honour of making the attempt: it is one of the most beauteous ornaments of the crown of humanity which distinguishes them among all other societies of christians. They had for a long time to struggle with the ordinary obstacles of prejudice and indifference on the part of the public — the routine of the tribunals, and the repulsive incredulity of frigid reasoners.

The penitentiary house at Philadelphia is described, not only in the official reports of its governor, but also in the accounts of two disinterested observers, whose agreement is the more striking, as they brought to its examination neither the same prejudices nor views. The one was a Frenchman, the Duke de Liancourt, well acquainted with the arrangements of hospitals and prisons; — the other an Englishman, Captain Turnbull, more occupied with maritime affairs than politics or jurisprudence.

Both of them represent the interior of this prison as a scene of peaceful and regular activity. Hauteur and rigour are not displayed on the part of the gaolers, nor insolence nor baseness on the part of the prisoners. Their language is gentle; a harsh expression is not permitted. If any fault is committed, the punishment is solitary confinement, and the registration of the fault in a book, in which every one has an account opened, as well for good as for evil. Health, decency, and propriety, reign throughout. There is nothing to offend the most delicate of the senses; no noise, no boisterous songs nor tumultuous conversation. Every one, engaged with his own work, fears to interrupt the labours of others. This external peace is maintained as favourable to reflection and labour, and well calculated to prevent that state of irritation so common elsewhere among prisoners and their keepers.

"I was surprised," said Captain Turnbull, "at finding a woman exercising the functions of gaoler. This circumstance having excited my curiosity, I was informed that the husband having filled the same situation before her, amidst the attentions he was paying to his daughter, he was seized with the yellow fever and died, leaving the prisoners to regret that they had lost a friend and protector. In consideration of his services, his widow was chosen to succeed him. She has discharged all the duties with equal attention and humanity."

Where shall we find similar traits in the registers of a prison? They call up the pictures of a future golden age depicted by the prophet, when "the wolf shall lie down with the lamb, and a little child shall lead them."

I cannot refuse to transcribe two other facts, which do not stand in need of any commentary: — "During the yellow fever in 1793, there was much difficulty in obtaining nurses for the sick in the hospitals at Bush Hill. Recourse was had to the prison. The question was asked; the danger of the service was explained to the convicts; as many offered themselves as were wanted. They discharged their duties faithfully till the conclusion of that tragic scene, and none of them demanded any wages till the period of their discharge."

The females gave another proof of good conduct during the course of the contagion. They were requested to give up their bedsteads for the use of the hospital: they willingly offered their beds also.

Oh Virtue! where wilt thou hide thyself? exclaimed the philosopher, upon witnessing an act of probity on the part of a beggar. Would he have been less surprised at this act of heroic benevolence in a criminal prison?

Had this good conduct of the prisoners been only a simple suspension of their vices and crimes, it would have been a great point gained; but it extended much further: —

"Of all the criminals who have been found

guilty," says Turnbull, "there has not been five in each hundred who have been in the prison before."

At New York, although the result has not been so favourable, it exhibits the good effects of the system: — "During the five years ending in 1801," says Mr. Eddy, the principal governor of the Penitentiary, in the account rendered to his fellow-citizens, "of three hundred and forty-nine prisoners who have been set at liberty at the expiration of their sentences, or by pardons, twenty-nine only have been convicted of new offences; and of this twenty-nine, sixteen were foreigners. Of eighty-six pardoned, eight have been apprehended for new offences; and of this eight, five were foreigners."

It must, however, be remembered, that we may guard against exaggeration, that of these liberated prisoners, many may have expatriated themselves, and committed crimes in the neighbouring States, being unwilling to expose themselves to the austere imprisonment of New York or Philadelphia; for it is a fact, that the risk of death is less frightful to men of this temper, than laborious captivity.

The success of these establishments is, without doubt, owing in great measure to the enlightened zeal of their founders and inspectors; but it has permanent causes in the sobriety and industry established, and the rewards bestowed for good conduct.

The rule which has ensured sobriety, has been the entire exclusion of strong liquors: no fermented liquor is allowed, not even small beer. It has been found more easy to insure abstinence than moderation. Experience has proved that the stimulus of strong liquors has only a transitory effect, and that an abundant and simple nourishment, with water for the only drink, fits men for the performance of continued labours. Many of those who entered the prison of New York with constitutions enfeebled by intemperance and debauchery, have regained, in a short time, under this regime, their health and vigour.

The Duke de Liancourt and Captain Turnbull have entered into more precise details. We learn from them, that since the adoption of this system, the charge for medicines, which amounted annually to more than twelve hundred dollars, has been reduced to one hundred and sixty. This fact affords a still stronger proof of the salubrity of this prison.

This exposition, in which I have omitted many favourable circumstances, without suppressing anything of a contrary nature, is sufficient to show the superiority of penitentiaries over the system of transportation. If the results have been so advantageous in America, why should they be less so in England? The nature of man is uniform: criminals are not more obstinate in the one place than the other: the motives which may be employed are equally powerful. The new plan proposed by the author of the Panopticon, presents a sensible improvement upon the American methods: — the inspection is more complete — the instruction more extended — escape more difficult; publicity is increased in every respect; the distribution of the prisoners, by means of cells and classes, obviates the inconvenient association which subsists in the Penitentiary at Philadelphia. But what is worth more than all the rest is, that the responsibility of the governor in the Panopticon system is connected with his personal interest in such manner, that he cannot neglect one of his duties, without being the first to suffer; whilst all the good he does to his prisoners redounds to his own advantage. Religion and humanity animated the founders of the American Penitentiaries: will these generous principles be less powerful when united with the interests of reputation and fortune? the two grand securities of every public establishment — the only ones upon which a politician can constantly rely — the only ones whose operation is not subject to relaxation—the only ones which, always being in accordance with virtue, may perform its part, and even replace it when it is wanting.

CHAPTER IV.

FELONY.

Felony is a word of which the signification seems to have undergone various revolutions. It seems at first to have been vaguely applied to a very extensive mode of delinquency, or rather for delinquency in general, at a time when the laws scarce knew of any other species of delinquency cognizable by fixed rules, than the breach of a political engagement, and when all political engagements were comprised in one, that of feudal obligation. Upon feudal principles, everything that was possessed by a subject, and was considered as a permanent source of property and power, was considered as a gift, by the acceptance of which the acquirer contracted a loose and indefinite kind of engagement, the nature of which was never accurately explained, but was understood to be to this effect: that the acceptor should render certain stipulated services to the donor, and should, in general, refrain from everything that was prejudicial to his interests. It was this principle of subjection, in its nature rather moral than political, which at the first partition of conquered countries, bound the different ranks of men, by whatever names distinguished, to each other — as the barons to the prince, the knights to the barons, and the peasants to the knights. If, then, the acceptor failed in any of these points — if in any one of his steps he fell from the line which

had been traced for him, and which at that time was the only line of duty, he was not such a man as his benefactor took him for; the motive for the benefaction ceased. He lost his fief, the only source of his political importance, and with it all that was worth living for. He was thrust down among the ignoble and defenceless crowd of needy retainers, whose persons and precarious properties were subject to the arbitrary disposal of the hand that fed them. So striking and impressive a figure did such a catastrophe make in the imaginations of men, that the punishment of death, when, in course of time, it came in various instances to be superadded to the other, showed itself only in the light of an appendage.* It came in by custom, rather than by any regular and positive institution: it seemed to follow rather as a natural effect of the impotence to which the inferior was reduced, than in consequence of any regular exertion of the public will of the community.

This seems to have been the aspect of the times at the first dawnings of the feudal polity; but it was impossible things should long remain in so unsettled a state. It is in such times, however, that we are to look for the origin of a word which, sometimes as the name of a crime, sometimes as a punishment, is to be met with in the earliest memorials that are extant of the feudal law.

Some etymologists, to show they understood Greek, have derived it from the Greek: if they had happened to have understood Arabic, they would have derived it from the Arabic. Sir Edward Coke, knowing nothing of Greek, but having a little stock of Latin learning, which he loses no opportunity of displaying, derives it from *fel*, gall. Spelman, who has the good sense to perceive that the origin of an old northern word is to be looked for in an old northern language, rejecting the Greek, and saying nothing of the Latin, proposes various etymologies. According to one of them, it is derived from two words—*fee*, which in ancient Anglo-Saxon had, and in modern English has, a meaning which approaches to that of property or money; and *lon*, which in modern German, he says, means *price*: fee lon is therefore *pretium feudi*. This etymology, the author of the Commentaries adopts, and justifies by observing, that it is a common phrase to say, such an act is as much as your life or estate is worth. But *felony*, in mixed Latin *felonia*, is a word that imports action. I should therefore rather be inclined to derive it from some verb, than from two substantives, which, when put together, and declined in the most convenient manner, import not any such meaning.

* Blackst. Com. 95.

The verb *to fall*, as well as *to fail*, which probably was in its origin the same as the other, by an obvious enough metaphysical extension, is well known to have acquired the signification of *to offend*; the same figure is adopted in the French, and probably in every other language.†

In Anglo-Saxon there is such a word as *feallan*,‡ the evident root of the English word now in use. In German, there is such a word as *faellen*, which has the same signification. This derivation, therefore, which is one of Spelman's, is what seems to be the most natural. So much for the origin of the word: not that it is of any consequence whence it came, so it were but gone.

As the rigours of the feudal polity were relaxed, and fiefs became permanent and descendible, the resumption of the fief upon every instance of trivial delinquency became less and less of course. A feudatory might commit an offence that was not a felony. On the other hand, it was found, too, that for many offences the mere resumption of the feud was not by any means a sufficient punishment; for a man might hold different feuds of as many different persons. The Sovereign, too, interposed his claim on behalf of himself and the whole community, and exacted punishments for offences which, to the immediate lord of the feudatory, might happen not to be obnoxious. In this way, for various offences, pecuniary and corporal punishments in various degrees, and even death itself, came in some instances to be substituted—in others, to be superadded, by positive laws to that original indiscriminating punishment, which used at first to follow from almost every offence. That punishment remained still inseparably annexed to all those offences which were marked by the highest degree of corporal punishment, the punishment of death; partly with a view of giving the lord an opportunity of ridding himself of a race of vassals tainted by an hereditary stain; partly in order to complete the destruction of the delinquent's political as well as natural existence. The punishment of forfeiture, being the original punishment, still continued to give denomination to the complex mass of punishment of which it now constituted but a part. The word felony now came to signify a punishment, viz. the complex mode of punishment, of which

† We say, he fell, as well as he swerved, from the line of duty: he fell from his allegiance. The original sin of man is called the fall of man. Lord Clarendon says somewhere, he fell from his duty and all his former friends. Let him who standeth, says the Gospel, take heed lest he fall. In ecclesiastical jurisprudence, a heretic relapsed, is one who, having once been convicted of heresy, *falls* into the same offence a second time.

‡ *An* is nothing but the common termination of the infinitive mood.

that simple mode of punishment, which anciently stood annexed to every delinquency a feudatory could incur, was a main ingredient.

At this period of its history, when the above was its signification, the word felony was, as a part of the Norman jurisprudence, imported into this country by the Norman conquerors; for among the Saxons there are no traces of its having been in use. At this period, it stood annexed only to a few crimes of the grossest nature—of a nature the fittest to strike the imagination of rude and unreflecting minds, and these not very heterogeneous. Theft, robbery, devastation when committed by the ruinous instrument of fire, or upon the whole face of a country with an armed force; these, and homicide, the natural consequences of such enterprises, or of the spirit of hostility which dictated them, were included by it. At this time, the import of the word felony was not, either as the name of a punishment or as the name of an offence, as yet immeasurably extensive. But lawyers, by various subtleties, went on adding to the mass of punishment, still keeping to the same name. At the same time, legislators, compelled by various exigencies, went on adding to the list of offences punishable by the punishment of that name; till at length it became the name not of one, but of an incomprehensible heap of punishments; nor of one offence only, but of as many sorts of offences almost as can be conceived. Tell me now that a man has committed a felony, I am not a whit the nearer knowing what is his offence: all I can possibly learn from it is, what he is to suffer. He may have committed an offence against individuals, against a neighbourhood, or against the state. Under any natural principle of arrangement, upon any other than that which is governed by the mere accidental and mutable circumstance of punishment, it may be an offence of any class, and almost of every order of each class. The delinquents are all huddled together under one name, and pelted with an indiscriminating volley of incongruous, and many of them, unavailing punishments.

Felony, considered as a complex mode of punishment, stands at present divided into two kinds: the one styled *Felony without benefit of Clergy*, or, in a shorter way, *Felony without Clergy*, or as capital punishment is one ingredient in it, *Capital Felony;* the other, Felony within benefit of Clergy, Felony within Clergy, or *Clergyable Felony*. The first may be styled the greater—the latter, the lesser felony. There are other punishments to which these are more analogous in quality, as well as in magnitude, than the one of them is to the other. Such is the confusion introduced by a blind practice, and, as the consequence of that practice, an inapposite and ill-digested nomenclature.

How punishments so widely different came to be characterized in the first place by the same generic name, and thence by specific names, thus uncouth and inexpressive, shall be explained by and by, after we have analyzed and laid open the contents of the greater felony, of which the other is but an off-set, detached from the main root.

History of the Benefit of Clergy.

The Christian religion, ere yet it had gained any settled footing in the state, had given birth to an order of men, who laid claim to a large and indefinite share in the disposal of that remote, but boundless mass of pains and pleasures, which it was one main business of that religion to announce. This claim, in proportion as it was acquiesced in, gave them power: for what is power over men, but the faculty of contributing in some way or other to their happiness or misery? This power, in proportion as they obtained it, it became their endeavour to convert (as it is in the nature of man to endeavour to convert all power) into a means of advancing their own private interest;—first, the interest of their own order, which was a private interest as opposed to the more public one of the community at large; and then of the individuals of that order. In this system of usurpation, a few perhaps had their eyes open; but many more probably acted under the sincere persuasion, that the advancement of their order above that of others, was beneficial to the community at large. This power, in its progress to those ends, would naturally seek the depression, and by degrees the overthrow, of the political power of any other that opposed it. These operations, carried on by an indefinite multitude of persons, but all tending to the same end, wore the appearance of being carried on in concert, as if a formal plan had been proposed and unanimously embraced by the whole clergy, to subdue the whole body of the laity: whereas, in fact, no such plan was ever universally concerted and avowed, as in truth there needed none. The means were obvious—the end was one and the same. There was no fear of clashing: each succeeding operator took up the work where his predecessor had left off, and carried it on just so far as interest prompted and opportunity allowed.

In pursuance of this universal plan, not concerted, but surer than if it had been the result of concert, were those exemptions laid claim to, which, by a long and whimsical concatenation of causes and effects, were the means of breaking down the punishment of felony into the two species of it that now subsist.

The persons of these favoured mortals, honoured as they pretended they were by a more immediate intercourse with the divinity,

and employed as they were incessantly in managing the most important, and indeed only important concerns of mankind, were of course to be accounted *sacred*—a word of loose, and therefore the more convenient, signification, importing, at bottom, nothing more than that the subject to which it was attributed, was or was not to be accounted an object of distant awe and terror. They were therefore not to be judged by profane judgments, sentenced by profane mouths, or touched, in any manner that was unpleasant to them, by profane hands. The places wherein that mysterious intercourse was carried on, imbibed the essence of this mysterious quality. Stones, when put together in a certain form, became sacred too. Earth, within a certain distance round about those stones, became sacred too. Hence the privilege of sanctuary. In short, the whole of the material as well as intellectual globe became divided into sacred and profane; of which, so much as was sacred was either composed of themselves, or become subjected to their power. The rest of it lay destitute of these invaluable privileges, and, as the name imports, tainted with a note of infamy.

I pass rapidly over the progress of their claim of exemption from profane judicature: the reader will find it ably and elegantly delineated in Sir W. Blackstone's Commentaries.

As to the causes, those which come under the denomination of felonies are the only ones with which at present we have to do. Confining our consideration, therefore, to these causes: as to persons, it was first claimed, one may suppose, for those of their own order—by degrees, for as many as they should think fit, for that particular purpose, to recognise as belonging to that order. By degrees, the patience of profane judges was put to such a stretch, that it could hold no longer; and they seem to have been provoked to a general disallowance of those exceptions, which had swelled till they had swallowed up in a manner the whole rule. This sudden and violent reformation, wearing the appearance of an abuse, the clergy had influence enough in the legislature to procure an act* to put a stop to it. By this act it was provided, that all manner of clerks, as well secular as religious, which shall be from henceforth convict before the secular justices, for any treasons or felonies touching other persons than the King himself, or his Royal Majesty, shall from henceforth freely have and enjoy the privilege of Holy Church, and shall be, without any impeachment† or delay, delivered to the Ordinaries‡ demanding them.

* 25 Edw. III. Stat. 3, c. 4.

† It should be *hindrance*: the French original is *empeschement*.

‡ Meaning the Bishop, or other ecclesiastical superior.

This statute, one should have thought, would have been sufficiently explicit, on the one hand, to secure the exemption to all persons in clerical orders; so, on the other hand, to exclude all persons not possessed of that qualification. To prove a person entitled to the exemption, the obvious and only conclusive evidence was the instrument of ordination. But the different ranks of persons who were all comprised under the common name of clerks, and as such partook more or less of the sacred character, were numerous; and some of these seem to have been admitted to their offices without any written instrument of ordination. Whether this omission was continued on purpose to let in a looser method of evidence, or whether it was accidental, so it is that the clergy had the address to get the production of that written evidence dispensed with. In the room of it, they had the address to prevail on the courts to admit of another criterion, which, ridiculous as it may seem at this time of day, was not then altogether so incompetent: "Orders," they said, or might have said, "may be forged, or may be fabricated for the purpose; but as a proof that the man really is of our sacred order, you shall have a proof that can neither be forged nor fabricated; he shall read as we do." The book was probably at first a Latin book—the Bible, or some other book made use of in church service. At that time, few who were not clergymen could read at all, and still fewer could read Latin. And the judges, if they happened to see through the cheat, might in some instances, perhaps, not be sorry to connive at it, in favour of a man possessed of so rare and valuable a qualification. But one book was easily substituted for another: a man might easily be tutored so as to get by rote a small part of a particular book; and as society advanced to maturity, learning became more and more diffused. We need not wonder, therefore, if by the time of Henry VIIth, it was found that as many laymen as divines were admitted to the ecclesiastical privilege—I should suppose a great many more, for there is something in the ecclesiastical function, that in the worst of times will render them less liable than others of the same rank and fortune to fall into open and palpable enormities. A statute,‖ therefore, was made to apply a remedy to this abuse; and what would one imagine was that remedy? To oblige persons, claiming the benefit of clergy, to produce their orders? No; but to provide, that persons claiming it, and not being in orders, should not be allowed it more than once; and that *all* persons who had once been allowed it, should have a mark set upon them, whereby they might be known. Real clergymen—clergy-

‖ 4 Hen. VII. c. 13.

men who had orders to produce, were by an express provision of the statute, entitled to claim it *toties quoties*, as often as they should have need, which privilege they have still.

When a felon was admitted to his clergy, he was not absolutely set free, but delivered to the ordinary. The great point then was, if we may believe lay judges, who, it is to be confessed, are not altogether disinterested witnesses, to prove him innocent; for this tended to discredit the profane tribunal. This business of proving him innocent was called his *purgation*. If this were impracticable, he was put to penance; that is, subjected to such corporal punishment as the ordinary thought proper to inflict upon him, which we may imagine was not very severe. Thus it was that the clergy contrived to bind even the most stubborn spirits under the yoke of their dominion: the honest and credulous by their fears; the profligate, though incredulous, by their hopes.

Circumstances, however, are not wanting, which tend pretty strongly to make it probable, that when once a man got into the hands of the clergy, he almost always stood the purging, and proved innocent; and it is what the lay judges seem to have taken for granted would be the case of course. When, therefore, they made a point of making the offender suffer the train of punishments that stood annexed to acknowledged guilt, (death excepted, which was too much for them to attempt) they knew no other way of compassing it, than by insisting on his not being admitted to make purgation. These punishments, the imprisonment excepted, consisted altogether of forfeitures and civil disabilities; penalties with which the ecclesiastical superior had nothing to do, and which it lay altogether within the province of the temporal judge to enforce. One should have thought, then, it would have been a much less apparent stretch of authority in the latter, to give effect to the proceedings of his own judicature, than to lay a restraint on the ecclesiastical judge in the exercise of what was acknowledged to be his. But it were too much to expect anything like consistency in the proceedings of those rude ages. The whole contest between the temporal judge and the spiritual was an irregular scramble, the result of which was perpetually varying, according to the temper of individuals and the circumstances of the time.

By the time of Queen Elizabeth it came to be generally understood that purgation, which originally meant trial, was synonymous to acquittal.* This is so true, that when by a statute of that reign, purgation came to be abolished,† the legislature, instead of appointing a trial, appointed punishment. Persons claiming the benefit of clergy, instead of being delivered to the ordinary to make purgation, were now, after being burnt in the hand, to be forthwith delivered out of prison, unless the temporal judge should think proper to sentence them to imprisonment, which he was now for the first time empowered to do, for any time not exceeding a year.

It will here be asked, what was done with the pecuniary punishments, the forfeitures, the corruption of blood, and the disabilities? The answer is, nothing at all — they were never thought of. However, by one means or other, there is now an end of them. The legislator neither then nor since has ever opened his mouth upon the subject. But the judge, drawing an argument from that silence, has opened his, and construed them away.

This bold interpretation is a farther proof how entirely the ideas of purgation had become identified with that of acquittal. When a man was admitted to make purgation, he was acquitted: by that means he was discharged from these pecuniary penalties. Now, then, that the legislature has appointed that in the room of going free, the delinquent may now be punished by a slight punishment, and that not of course, but only in case the judges should think fit to order it of their own accord, we cannot, said the judges, suppose that it meant to subject him to a set of punishments so much severer than those it has named. Therefore, as to all but these, coming in place of an acquittal, we must look upon it as a pardon. Having, by this chain of reasoning, got hold of the word pardon, they went on applying it to other purposes in a very absurd manner; but, as we have already had occasion to observe, with a beneficial effect.

One would imagine, that being to suffer

* It is amusing enough to observe the continual struggle between the spiritual and the carnal judge, as described in Staundford, title Clergy. It seems to have been a continual game of leap-frog, in which sometimes spirit, sometimes flesh, was uppermost.[a]

A man, however, was not always so very kindly dealt with: he fared better or worse, according as he happened to be in favour with the church. If they happened not to like him, although he had not been tried when delivered to them, they would not admit him to his purgation, but kept him in hard durance without trial. The temporal courts were then obliged to drive them on to trial.[b] If he was a favourite, although convicted, no guest could be better entertained: they used to cram him at both ends. This a good Archbishop admits, who, being driven by the Parliament to make an ordinance to remedy this mischief, appoints, that in certain cases they shall be dieted in a manner he prescribes: speaking all the while in much worse terms of the lay judges than of the malefactors who met with this reception from their friends.

† 18 Eliz. c. 7.

[a] Tale of a Tub.

[b] Staundford, Clergy, c. 48. Bracton.

nothing, (what has been mentioned only excepted) first, because he was acquitted, next, because he was pardoned, there was an end of all pecuniary penalties, of the one species of forfeiture as well as the other. This, however, neither was nor is the case. A man did then, and does still, continue subject to the forfeiture of his personal estate. The reason of this is of true legal texture, and altogether characteristic of ancient jurisprudence. Forfeiture of real estate is not to take place till after judgment: forfeiture of personal estate, without the least shadow of a reason for the difference, is to take place before judgment; to wit, upon conviction. Now, ever since the days of Henry VI., it has not been the way to admit a man to plead his clergy till *after* conviction. Now, then, if a man comes and pleads his clergy, whatever goods he had, the king has got them. This being the case, having had your clergy, you are innocent, or, what comes to the same thing, you are forgiven. All this is very true; but as to your money, the king, you hear, has got it, and when the king has got hold of a man's money, with title or without title, such is his royal nature, he cannot bear to part with it; for the king can do no man wrong, and the law is the quintessence of reason. To make all this clear, let it be observed there is a kind of electrical virtue in royal fingers, which attracts to it light substances, such as the moveables and reputed moveables of other men; there is, moreover, a certain glutinous or viscous quality, which detains them when they have got there.

Such are the grounds upon which the forfeiture of personal estate, in cases of clergyable felony, still continues to subsist.

This act gave the finishing stroke to the abusive *jurisdiction* of the clergy. The still more abusive exemption remained still, but so changed and depreciated by a lavish participation of it with the laity, that its pristine dignity and value was almost entirely obliterated. By the turn they had given to it, it was originally an instrument of unlimited dominion over others: it was now sunk into a bare protection, and that no longer an exclusive one, for themselves.

At last came the statute of Queen Anne,* which gives the benefit of clergy to *all* men whatsoever, whether they can read, or cannot. This, together with a statute of the preceding reign,† which had already given the same benefit to *all women*, gave quite a new import to the phrase. In words, it confirmed and extended the abusive privilege; in reality, it abolished it. It put the illiterate altogether upon a footing with the literate; providing, at the same time, that in the case of the offences to which it extended, both classes alike should suffer, not the punishment which the unprivileged, but that which the privileged, had been used to suffer before.

Since then, to allow the benefit of clergy to any offence, is to punish all persons who shall have committed that offence, in the same manner as lettered persons were punished before: it is to punish in a certain manner all persons for that offence. To take away this benefit, is to punish in a certain other manner, much more severe, all persons for that offence. The difference between the having it and the taking it away, is now the difference between a greater and a lesser degree of punishment: the difference formerly was the allowing, or not allowing, an oppressive and irrational exemption.

But these entangled and crooked operations have been attended with a variety of mischiefs, which are not by any means cured as yet, and of which scarce anything less than a total revision of the criminal law can work a total cure. Such a veil of darkness, such a cobweb work of sophistry, has been thrown over the face of penal jurisprudence, that its lineaments can scarcely be laid open to public view but with great difficulty, and with perpetual danger of mischief.

Of the mischief and confusion that has thus been produced, I will mention one instance, which will probably be thought enough.

In a statute of Henry VIII,‡ by a strange caprice of the legislature, the benefit of clergy was taken away in the lump from all offences whatever, which should happen to be committed on the high seas. He might as well have said, or in such a county, or by men whose hair should be of such a colour. In point of *expediency*, of a provision like this, one knows not what to make. Considered with reference to other parts of the legal system, it is reasonable, as doing something towards abolishing an unreasonable distinction. Considered in the same point of view, it is unreasonable, as making that abolition no more than a partial one, and grounding it, as far as it went, on a circumstance totally unconnected with the mischievousness of the offence. Considered by itself, it is again unreasonable, as tending to subject to the punishment of death for a great many offences, a great many persons for whom a less punishment might suffice.

In point of fact, however, what the legislature meant by it is clear enough: it meant that all men, without exception, privileged persons as well as others, should suffer death and so forth, who should be guilty of any kind of felonies upon the high seas, instead of their being made, some of them, to suffer death, others a punishment beyond comparison less severe. Would any one imagine what

* 5 Ann. c. 6.
† 3 & 4 W. & M. c. 9.

‡ 28 Hen. VIII. c. 15.

has been the effect of this provision? The effect of it has been, that these privileged persons, instead of suffering death, have suffered no punishment at all: yes, absolutely no punishment — not even that slight degree of punishment to which they before were subject. Now the case is, that at present, if one may be indulged in a solecism established by the legislature, all persons are privileged; so that now, all persons who may think proper to commit clergyable felonies on the high seas are absolutely dispunishable. This situation of things, in itself, is not altogether as it ought to be; but the means whereby it has been brought about are still worse. When a man is indicted of a clergyable offence within that jurisdiction, let his guilt be ever so plainly proved, the *constant course* is, for the judge to direct the jury to acquit him.* The man is proved to be guilty, in such a manner that no one can make a doubt about it. No matter; the judges direct the jury to say upon their oaths that he is not guilty.

In the ecclesiastical tribunal we have above been speaking of, things were so ordered, that, according to the author of the Commentaries, "felonious clerks" were not constantly, but "almost constantly" acquitted. I do beseech the reader to turn to that book, and observe in what energetic terms (partly his own, partly adopting what had been said on the same subject by Judge Hobart) the learned author has chosen to speak of this unjustifiable practice:† — "Vast complication of perjury and subornation of perjury — solemn farce — mock trial — good bishop — scene of wickedness — scandalous prostitution of oaths and forms of justice — vain and impious ceremony — most abandoned perjury." Such are the terms he uses; — to the reader it is left to make an application of them.

Felony without Benefit of Clergy.

As to felony without benefit of clergy, I will, in the first place, state the ingredients of which this mode of punishment is compounded.

Of punishments included under the title of felony without benefit of clergy, we must distinguish, in the first place, such as are made to bear upon the proper object — punishments *in personam propriam;* and in the second place, such as are thrown upon the innocent — punishments *in personam alienam.*

Of punishments *in personam propriam,* it includes the following: —

1. A total forfeiture of goods and chattels, whether in possession or in action at the time of the forfeiture taking place. It is a sweeping punishment of the pecuniary kind. It takes place immediately upon conviction; that is, upon a man's being found guilty — and does not wait for judgment; that is, for sentence being pronounced upon him.

2. Forfeiture of lands and tenements. This also is a sweeping punishment of the pecuniary kind. It does not take place till after judgment. This and the other forfeiture between them include the whole of a man's property, whether in possession or in action at the time of the forfeiture taking place. If he does not lose it by the one, he loses it by the other.

3. The corporal punishment of imprisonment till such time as the conclusive punishment is executed upon him. The length of it depends partly on the judge, partly on the king.

4. The disability to bring any kind of suit. This operates as a punishment in such cases only in which a long interval, as sometimes happens, intervenes between the sentence and the actual infliction of the ultimate punishment.

5. The corporal punishment of death, viz. simple death by hanging. As this punishment in general puts a speedy period to all the rest, the dwelling upon the effect of any other is what may, at first sight, appear useless: but this is not absolutely the case; for the execution of this punishment may, at the pleasure of the king, be suspended for any length of time, and in some instances has actually been suspended for many years. ‡

Thus much for punishment *in propriam personam.* Punishments *in alienam personam* included under it, are the following; some of them are instances of transitive, others of merely random punishment: —

His heirs-general, that is, that person or persons of his kindred who stand next to him, and so to one another in the order of succession to real property unentailed, forfeit all property of that denomination which he had enjoyed, and which, without an express appointment of his to the contrary, they would have been entitled to from him. This results as a consequence of the doctrine of corruption of blood: this is an instant forfeiture: it is a sweeping punishment of the pecuniary kind upon the heir. It may amount to a forfeiture, total or partial, of all the immoveable property the heir would be worth, or to no forfeiture at all. If, previously to the commission of the offence, the offender had settled upon his heir-apparent the whole or any part of what property he had of the kind in question, this the heir will not be deprived of.

* 4 Comm. c. 28. Foster, 288. Moor, 756. † Ib.

‡ Sir Walter Raleigh was kept for many years with the halter about his neck: he had the command given him of an expedition; went to America, where he committed piracies on the Spaniards; came back again; and was hanged at last for the original offence.

2. His heir, as before, forfeits his hope of succession to all such real property as he must make title to through the delinquent, as standing before him in the order of consanguinity to the person last seized. This is a remote contingent forfeiture — another pecuniary punishment of the sweeping kind. In this the uncertainty is still greater than in the former case.

3. Any creditors of his, who have had real security for their debts, forfeit such security, in case of its having been granted to them subsequently to the time of the offence committed. This, where it takes place, is a fixed punishment of the pecuniary kind. It is uncertain as to the person; but if there be a person on whom it falls, it is certain as to the event.

4. Any persons who may have purchased any part of his real property, forfeit such property, in case of this purchase having been made by them subsequently to the time of the offence. This, again, is a fixed punishment of the pecuniary kind. It is uncertain whether it shall fall upon any person, because it is uncertain whether there be a person so circumstanced; but if there be, it is certain as to the event of its falling.

5. Any persons who hold lands or tenements of him under a rent, are obliged to pay over again, to the person on whom the forfeiture devolves, whatever they may have paid to the delinquent subsequently to the time of the offence.

These four last denominations of persons are made to suffer in virtue of the doctrine of *back-relation*. According to legal notions, it is the delinquent that suffers, by the forfeiture being made to relate back to the time of the offence: as if it were a new suffering to a man to be made to have parted with what he had already parted with of his own accord. In plain English, it is the people themselves — the tenants, purchasers, and creditors, that suffer: it is they who forfeit, and not he.

Again, by virtue of the forfeiture of what is called his personal property, the following denominations of persons are made to suffer: —

1. His wife: by being deprived of whatever she would have been entitled to under his will, or under the law of distributions.

2. His children, or others next of kin: by losing what they might, in the same manner, have become entitled to.

3. His creditors: by losing all claim upon his personal estate. By this forfeiture, added to what takes place in the case of real estate, all his creditors whatever are defrauded; such only excepted as may have been fortunate enough to have obtained a real security previous to the commission of the offence.

We now come to *Felony within Clergy*. The mass of punishments included within this title are much less various, as well as less severe.

Of punishments *in propriam personam*, it includes only the first and third of those which are included under the other species of felony.

In the room of the fifth and last punishment, the punishment of death, there is one that takes place, or rather is said to take place, of course: I mean, marking in the hand.* Others there are, which, besides the former, take place optionally, at the discretion of the judge; conjunctively, with respect to the three former — disjunctively, with respect to one another.

This punishment of marking is now become a farce. It is supposed to be inflicted in open court, immediately after the convict, in order to exempt himself from the punishment of the other felony, has been made — if a woman, to plead the statute — if a man, to tell the solemn lie that he is a clerk. The mark to be inflicted is, according to the statute, to be the letter T, unless the offence be murder, in which case it is to be an M; murder, at that time, not as yet having been taken out of the benefit of clergy: as it has, however, since, the mark ought now to be that of a T in all cases. The part to be marked is the brawn of the left thumb; so that if a man happens to have lost his left thumb, he cannot be marked at all; or, if afterwards he chooses to cut it off, he may prevent its answering the purpose it was meant to answer, that of distinguishing him from other men.

The instrument originally employed was a heated iron, with a stamp upon it of the shape of the letter to be marked. To the judges of that time, this was the only expedient that occurred for marking upon the human skin such a mark as should be indelible. At present, the practice is to apply the iron, but it is always cold: this is what is called burning with a cold iron, that is, burning with an iron that does not burn; in consequence, no mark at all is made. The judge presides at this solemn farce: by no one is it complained of; by many it is approved; it is mildness, humanity: it is true that the law is eluded, and turned into ridicule; but the judge spares himself the pain of hearing the cries of a man to whose flesh a red-hot iron is applied. It may be asked, why do not the judges propose that the law should be made conformable to the practice? I cannot tell.

The judge that first disregarded the statute was guilty of the assumption of illegal power: he who should now have the courage to obey it, might now affix the prescribed mark without putting the delinquent to any considerable pain.†

* 4 Hen. VII. c. 13.

† The statute directs that the convict shall be "marked:" the mode of marking is left altogether to the judge. The author of the Com-

The other punishment, which in all cases of felony within clergy, may, at the discretion of the judge, be superadded or not to those which we have seen, are those of imprisonment and transportation.

For the second offence of a clergyable felony, capital felony is the punishment.*

Clerks in orders are alone exempted:† peers are not: women are expressly subjected to it. It is certainly a distinction highly honourable to the clergy, that they may go on pilfering, while other people are hanged for it.

Why a man, having been punished for one act of delinquency, should be punished more than ordinarily for a second act of the same species of delinquency, or even for any other offence of the same species of delinquency, there is at least an obvious, if not a conclusive reason, But why, when a man has been punished by a certain mode of punishment, and then commits an offence as different as any offence can be from the former, the punishment for this second offence is, because it happens to be the same with that for the first, to be changed into a punishment altogether different, and beyond comparison more penal, is what it will not, I believe, be easy to say. Is it because the first mode of punishment having been tried upon a man, the next above it, in point of severity, is that of capital felony? That is not the case; for præmunire is greatly more penal than clergyable felony. I mention this as being impossible to justify, not as being difficult to account for, since nothing better could consistently be expected from the discernment of those early times.

There is one thing which a clergyable felon does not forfeit, and which every other delinquent would forfeit for the most venial peccadillo, and that is reputation: I mean that special share of negative reputation which consists in a man's not being looked upon as having been guilty of such an offence. This share of reputation the law, in the single instance of clergyable felony, protects a delinquent, in so far forth as it is in the power of law, by brute violence, to counteract the force of the most rational and salutary propensities. If a man has stolen twelve-pence, and been convicted of it, call him a thief and welcome. But if he had stolen but eleven-pence halfpenny, and been convicted of it, and punished as a felon, call him a thief, and the law will punish you. This has been solemnly adjudged.

I say convicted and punished as a felon; for if he has not been convicted of it, in virtue of the general rule in case of verbal defamation, you may call him so if you can prove it; but when the law, by a solemn and exemplary act, has put the matter out of doubt, then you must not mention it. Would any one suspect the reason? It is because the statute which allows the benefit of clergy operates as a pardon. It has the virtue to make that not to have been done which has been done; and it was accordingly observed, that a man could no more call another thief who had been punished for it in this way, (thief say they *in the present time*) than say he *hath* a shameful disease when he had had it, and has been cured of it.‡

It is there also said, with somewhat more colour of reason, though in despite of the last-mentioned rule, "that there is no necessity or *use* of slanderous words to be allowed to ignorants," and that, though the arresting of a pardoned felon, by one who knows not of the pardon, may be justifiable, because this is in "advancement of justice; yet so it is not to call him thief, because that is neither necessary, nor advanceth nor tends to justice." He who said this knew not, or did not choose to know, how mighty is the force, and how salutary the influence, of the *moral* sanction; how much it contributes to support, and in what a number of important instances it serves to controul the caprices, and supply the defects, of the *political*. It was perhaps Sir Edward Coke—a man who, from principle, was a determined enemy, though, from ill humour, upon occasion an inconsistent and unsteady friend to political liberty—who in his favourite case, *de libellis famosis*, has destroyed, as far as was in his power to destroy, the safeguard of all other liberties, that of the press;—proscribing all criticism of public acts; silencing all history; and vying in the extent of his anathemas with the extravagance of the most jealous of the Roman Emperors.

CHAPTER V.

OF PRÆMUNIRE.

The punishment of Præmunire‖ consists in the being "put out of the King's protection," and "in the forfeiture of lands and tenements, goods and chattels;" but such is the

mentaries (4 Comm. p. 367, ed. 1809) "burnt with a hot iron." It is plain by this that he had never read the statute: for the statute, which is a very short one, says not a syllable about burning, nor about a hot iron.

* 4 Hen. VII. c. 13.

† By 4 Hen. VII. c. 13; repealed in effect, *quoad hoc*, by 28 Hen. VII. c. 1, and 32 Hen. VIII. c. 3: and revived in effect *quoad hoc* by 1 Ed. VI. c. 12. p. 10.

‡ Hobart, 81.

‖ This word, from being the name of nothing at all, first became the name of a writ, then the name of a punishment, and from thence, as was natural, the name of an offence; to wit, of as many offences as were punishable by that punishment.

uncertainty of English law, that some add to the above, imprisonment during the King's pleasure, and others say for life. Sir Edward Coke is for adding loss of credibility: he might as well have added, loss of ears; but I do not find that this conceit has been taken up by anybody else.

The offences to which this punishment has been applied are as heterogenous as any that can be imagined. The offence to which it was first applied was an offence against government; since that, besides a multitude of other offences against government, it has been applied to various offences against the property, against the personal liberty of individuals, and against trade!*

What it is that in such a variety of laws should have tempted the legislature, instead of the known and ordinary names of punishment, to devise a new and unexpressive name, to which no meaning whatever could be annexed, without rummaging over a confused parcel of old French statutes, is not easy to assign. There is nothing gained by it in any way, not in point of brevity; for in one of the statutes in which it is described with the most conciseness, I find more words are taken up by this uncouth description, than would be by the plain one: there is nothing gained by it in point of precision; for the word has no signification whatever, but by reference to the words of the old statute, and consequently cannot be more precise than they are.

The only recommendation I can find for it is, that it is a Latin word; added to the notion, perhaps, that, as being less intelligible than most other names of punishments, it might be more tremendous.

If this has been the design, it has been in some measure answered. Terrible, indeed, is the name of Præmunire; it is become a kind of bugbear, in which shape it has descended even among the lowest mob. It is used as synonymous with a scrape; not that the sort of persons last mentioned have any much clearer idea of the particular sort of scrape, than those have who bring others into it by solemn acts of legislation.

CHAPTER VI.

OUTLAWRY.

THE punishment known in practice by the name of Outlawry, consists of the following ingredients:—

1. Forensic disability, which may be called simple outlawry.
2. Forfeiture of personal estate.
3. Forfeiture of the growing profits of the real estate.
4. Imprisonment, &c.

This is the punishment inflicted for the offence of absconding from justice, in all cases, except where the punishment for the principal offence amounts to felony: in this case, a man against whom a sentence of outlawry is pronounced, is punished as if he had been convicted of the principal offence.

As the offence of absconding is a *chronical* offence, the punishment applied to it should be a *chronical* punishment, such an one as, being made to cease upon the cessation of the offence, may operate only as an instrument of compulsion. All these punishments are capable of being made so: but none are so upon the face of them; none were so originally. They are by this time, however, rendered so in great measure by modern practice, which has corrected the inordinate severity of the original institution.

This punishment applies in most cases, but not in all cases: in all cases where the prosecution for the original offence was in the criminal form; that is, in other words, in all criminal suits: it applies in most, but not in all civil suits. In the same civil suit, it applies or does not apply, according as the suit happens to be commenced before one court or another. In the same suit, and that carried on in the same court, it does or does not apply, according as the suit happens to have been commenced by one kind of jargon or another: all this without the least relation to the merits.

The punishment of forensic disabilities is applied to a multitude of offences; namely, to all those which are punished either by capital felony, or præmunire, or excommunication. In felony, it is useless, because the effect of it is merged in the punishment of death. In præmunire, it is justifiable, in as far as the punishment of total and perpetual impoverishment is an eligible mode of punishment, for of this it makes a necessary part. In excommunication, it is ineligible, on account of its inequality. To make it answer in an equable manner the purpose of impoverishment, is impracticable, for want of the punishment of forfeiture, of which it can come in only as an appendage.

Taking it by itself, and laying aside what is necessary to make it answer the purpose of impoverishment, it is superfluous when added to the punishment of imprisonment.

Whatever may be the offences cognizable in the ecclesiastical court, either corporal punishment is enough for them without pecuniary, or it is not. If it be enough, simple outlawry in addition to it is too much; if not,

* See a list of these offences in Blackstone's Commentaries. So difficult is it for any one to ascertain what the law is upon any subject, that though this punishment was adopted in the Regency, Act 5th Geo. III. c. 27, which was passed many years before the 4th volume of the Commentaries was printed, this act was not enumerated in that list.

it is too little. All this is upon the supposition that the delinquent is forthcoming for the purpose of undergoing imprisonment.

When a man absconds, and has no property in possession, or none that is sufficient to answer the demand upon him, in this case, and in this only, the punishment of simple outlawry is expedient. Why? not because it is eligible in itself, but because it is the only one the case admits of. When a man has no visible property in his own country, and has made his escape into another, generally speaking, his own country has no hold of him. This may happen, suppose in nine instances out of ten; but in the tenth, it may happen that he may have a debt due to him, which he may want the assistance of the laws of his own country to recover. If this debt be more in value to him than what is equivalent to the punishment he would be likely to suffer for the original offence which made him fly, he will return and submit to justice. The punishment of simple outlawry in this case will answer its purpose. It is eligible, therefore, in this case, because it has some chance of compassing its end, and no other punishment has any.*

Advantages and Disadvantages of Forfeiture of Protection.

To this mode of punishment, the objection of inequality applies with peculiar force. The fund out of which a man who has a fund of his own subsists, is either his labour, or his property. If he has property, it consists either in immoveables, or in moveables. If in immoveables, it is either in his own hands, or in those of other persons: if in moveables, it is either in public hands, or in private: if in private, either in his own hands, or in those of other persons.

A man who subsists by his labour, is in general scarcely at all affected by this punishment. He receives his pay, if not before he does his work, at least as soon as a small quantity of it is done.

A man whose fund of subsistence consists in immoveable property, is very little affected by this punishment, if that property is in his own hands. The utmost inconvenience it can subject him to, is the obliging him to deal for ready money. If his property is in the funds, he is not at all affected. There seems no reason to suppose that those who have the management of those funds, would refuse a man his dividend on the ground of any such disability. They would have no interest in such a refusal; and the importance of keeping up public credit would probably be a sufficient motive to keep them in this instance from departing from the general engagement.

If a man's property consists in moveable property which is in his own hands — for instance, stock in trade, it affects him indeed, but not very deeply. The utmost it can do, is to oblige him to deal for ready money; to preclude him from selling upon credit. It does not preclude him from buying upon credit, since, though others are not amenable to him, he is to others.

It is only where a man's property consists in credits — for example, in immoveables in the hands of a tenant, in a sum due for goods sold on credit, or in money out upon security, that it can affect him very deeply. Of such a man it may be the utter ruin.

In this case, whether a man suffer to the extreme amount, or whether he suffer at all, depends upon what? upon the moral honesty of those he happens to have to do with.

There are two circumstances, therefore, on which the quantum of this mode of punishment depends: 1*st*, The nature of the fund from whence he draws his subsistence; 2*d*, The moral honesty of the people he happens to have to do with. But neither of these circumstances is any ways connected with the degree of criminality of any offence for which a man can be thus punished. Of two men, both guilty, and that in the same degree, one may be ruined, the other not all affected. The greater punishment is as likely to fall upon the lesser offender as upon the greater: the lesser upon the greater offender, as upon the lesser.

* An anecdote given us by Selden, in his Table Talk,[a] may serve very well to illustrate the influence this mode of punishment may have over a man who is out of the reach of every other. In the reign of James I. an English merchant had a demand upon the King of Spain, which he could not get the King to satisfy. The merchant had already brought his action, and Selden, who was his counsel, advised him to proceed to outlawry. Writ after writ was sent to the sheriff to take his Majesty, and have his body before the justices at Westminster. His Majesty was not to be found. Great outcry, as is usual, was made after him, upon this, in sundry ale-houses. His Majesty did not happen to be at any of the ale-houses. He was accordingly proclaimed an outlaw; and a wolf's head, in due form of law, was clapt upon his shoulders,[b] so that any body might lay hold of him, and put him into jail, that had a mind for it.[c] The case was, his Majesty happened at that time to have demands upon several merchants in England, for which demands, so long as he continued under judgment of outlawry, he could not have his remedy. Upon this consideration, his ambassador, Gondamar, submitted and paid the money; upon which, the wolf's head was taken off, and the King's head put in its place.

[a] Title *Law*. [b] *Caput Lupinum*. — C. Litt. 128, b. Lamb. Leg. Tax, ch. 128. Fleta. L. 1, c. 27. Bract. L. 5, fol. 421. Britt. fol. 20. Mirror, c. 4, *Defaults Punishable*.

[c] Anciently, when a man had a wolf's head upon his shoulders, he might be killed by anybody. But this was altered in Edw. III.'s time. See C. Litt.

Another objection applies to this mode of punishment, on the score of *immorality*. The punishment being of a pecuniary nature, there is a profit arising out of it, which accordingly is to be disposed of in favour of somebody. And in whose favour is it disposed of? in favour of any one, who, having contracted an engagement with the delinquent, can, for the sake of lucre, be brought to break it.

It may be said, that the engagement being by the supposition rendered void, there is no harm in its being broken. True; it is void, as far as concerns the political sanction, but it is not void by the moral. All that the law does is not to compel him to perform it; but the interests of society require, and, accordingly, so does the moral sanction require, that a man should be ready to perform his engagement, although the law should not compel him. If a man can be brought in this way to break his engagement, it is a sign that the power of money over him is greater than that of the moral sanction. He is therefore what is properly termed an immoral man; and it is the law that either has begotten in him that evil quality, or at least has fostered it.

The dispensations, therefore, of the political sanction, are, in this case, set at variance with those which are, and ought to be, those of the moral sanction. It invites men to pursue a mode of conduct which the moral sanction, in conformity to the dictates of utility, forbids.

CHAPTER VII.

EXCOMMUNICATION.

VARIOUS and manifold are the evils which the punishment of excommunication inflicts, or proposes to inflict: various are the sources from whence they flow. It does not confine itself to the political sanction: it calls in, or makes as if it would call in, the two others to its assistance.

Of excommunication, there are two species, or degrees — the greater and the lesser. The greater contains all that the lesser does, and something more. I will first, then, give an account of those that are contained in the lesser, and then take notice of those that are peculiar to the other.

Those contained in the lesser are as follows: —

1. Imprisonment — the time unlimited, depending on the good pleasure of the judge: the severity of it is determined by the circumstance of its being in the common jail.

2. Penance, as a condition to the termination of the other punishment. By penance is meant, a corporal punishment of the ignominious kind. The particular manner of inflicting it shall be considered hereafter.

3. In lieu of the penance, commutation money. The quantum of it is not limited in a direct manner, but is in an indirect manner: it cannot be more than a man chooses to give, in order to avoid the corporal penance.

These two last are accidental ingredients in this complex mass of punishment. Their infliction or omission depends, in some measure, upon the will of the prosecutor. Those which follow, are inseparable.

4. Disability to sue, either in a court of law or equity. This is a punishment of a pecuniary nature, contingent in its nature, and uncertain as to time.

5. Disability of acting as an advocate,* or as an attorney, or procurator, for another: † that is, I suppose, in the ecclesiastical courts, and not in any other. This is a punishment of the class of those that affect a man's condition: in the present instance, it affects a man chiefly on a pecuniary account.

6. Disability of acting as a juryman. ‡

7. Disability of being presented to an ecclesiastical benefice: ‖ of this, the same account may be given as of the last disability but one.

8. Disability of bringing a suit, or action, as an executor.§ This is a punishment *in alienam personam;* affecting those who have a beneficial interest under the will.

9. Incapacity of being constituted or continued an administrator; or, at least, danger of being subjected to that disability.

10. Disability of being a witness. This, likewise, is another punishment *in alienam personam;* affecting those persons to whom this evidence, if given, would be beneficial in respect of their lives, fortunes, liberties, and every other possession that is in the protection of the law.

11. The being looked upon as a heathen and a publican. This, I suppose, is meant as a sort of infamy.¶

12. Exclusion from all churches: this is a species of personal restraint, that involves in it consequences that belong to the religious sanction.

13. Exclusion from the benefit of the burial service. I do not know under what class to rank this punishment: I do not very precisely know what benefit it is to a man, after he is dead, to have the service read over his body: if it be anything, it belongs to the religious sanction.

14. Exclusion from the benefit of the sacraments of baptism and the Lord's Supper: this belongs altogether to the religious sanction.

So much for the lesser excommunication: the greater adds two other circumstances to the catalogue.

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* Gibs. 1050.
† 2 Bacon's Ab. 674.
‡ 3 Blackst. Com. 101.
‖ Gibs. 1050.
§ God. O. L. 37, 8.
¶ Burn, Penance, 6.

1. *Exclusion from the commerce and communion of the faithful.**

2. *Disability of making a Will.*† This is a punishment that affects the power of the party; viz. in the present case, the investitive power performable in a particular manner, with respect to the ownership of such property as he shall die entitled to. In as far as the power of making a will includes that of appointing a guardian to a child, as also that of an executor to manage the property of a person of whom the party in question was executor, it is a punishment *in alienam personam:* the child may suffer for want of a proper guardian; the persons interested in the effects of the first testator may suffer for want of a proper person to manage those effects.

This is the mode, and the only mode of punishment, inflicted by those courts that go by the name of ecclesiastical, or spiritual courts. This they are forced to make serve for all occasions; they have neither less nor greater: it is the only punishment they have. When this punishment is pronounced, they have exhausted their whole penal code. If its brevity be its recommendation, it must be confessed that it has no other. Let us consider a little more particularly the punishments of which it is composed. Of imprisonment, nothing in particular need be said at present.

The punishment of penance demands more attention. It consists in the penitent being exposed, bare-headed and bare-legged, with a white sheet wrapped round the body, either in the parish church, or in the cathedral, or in the public market,‡ there to pronounce a certain form of words containing the confession of his crime. This, as has been already observed, is a corporal punishment of the ignominious kind, and might, if defined with precision, be employed with the same advantage as are other punishments of that description. The time at which it should take place, and the duration of the penance, ought to be determined; but there is nothing fixed with regard to them, so that it may continue for several hours, or only for an instant: it may take place before a crowd of spectators, or in the most absolute solitude. Besides this, there is a vast difference between the parish church of a village, and the cathedral of a great city, or the public market of a district. The larger or smaller concourse of spectators will render the punishment more or less severe.

The penitent ought to pronounce a formula containing an acknowledgment of his crime; a different formula ought therefore to be provided for every crime by law. This formula may be pronounced either distinctly or indistinctly: a man can hardly be expected, willingly, to proclaim his own shame. It would therefore be proper that he should only be required to repeat the words, which should be clearly and distinctly pronounced by an officer of justice, as is practised with respect to the administration of oaths. Certain persons, also, should be nominated to preside over the ceremony, and ascertain that everything is done according to law.

Till these points are regulated, this mode of punishment, though good in itself, will always be subject, as it is at present, to the greatest abuses: it will be executed with inequality, and capriciously, according to the condition of the individuals, rather than according to their crimes, and according as the character of the judge is more or less severe.

Penance is the punishment usually imposed, says Dr. Burn, "in the case of incest or incontinency." These two offences are classed together by the ecclesiastical compiler, and opposed to what he calls smaller offences and scandals. When we consider how far these two first offences are removed from one another, one is astonished to see them classed together, and visited with the same punishment. Far be it from me to treat lightly the exposure of innocence to infamy, the disturbance of domestic felicity, or to degrade the chaste raptures of the marriage bed to a level with the bought smiles of harlots. But there are degrees in guilt, which I see not why it should be meritorious to confound.

It is not often that we hear of this punishment being put in practice: examples of it were more frequent in former times, but now it is most commonly commuted for by the payment of a sum of money.

3. As to the different legal incapacities which form part of this punishment, the objections to which they are liable have been pointed out elsewhere. (See Book IV. *Misplaced Punishments.*)

4. Part of the punishment consists in the delinquent's being looked upon, if men think fit to look upon him in that light, as a heathen and a publican.

To try the effect of generals, the only way is to apply them to particulars. A. is not willing, or not able, to pay his proctor's, or another man's proctor's fees: he is in consequence excommunicated. Amongst his other punishments, he is to be looked upon as a heathen or a publican; that is, as being such a sort of man as Socrates, Cato, Titus, Marcus Antoninus, a collector of taxes, or a Lord of the Treasury. The heaping of hard names upon a man might, at one time, have been deemed a punishment; but such legal trifling now-a-days, serves only to render the laws ridiculous.

5. Exclusion from the churches. In our

* Lenderb, 266.
‡ Swinb. 109. God. O. L. 37.
† Godolph. Appendix, 18. Burn, tit. Penance.

days, an exclusion of this sort shows rather oddly under the guise of punishment. The great difficulty is now not to keep people out of the churches, but to get them in. The punishment, however, was not ill-designed, if it were intended to increase the desire of attending there, by forbidding it—the general effect of every prohibition being to give birth to a desire to infringe it: it affords a presumption, that what is prohibited is in itself desirable, or at least desirable in the opinion of the legislator, or he would not have prohibited it. Such is the natural supposition, when the interdiction relates to an unknown object; but even when it relates to an object which has been tried, and neglected from distaste, the prohibition gives to it another aspect. The attention is directed to the possible advantages of the act: having begun to think of them, the individual fancies he perceives them, and goes on to exaggerate their value: on comparing his situation with that of those who enjoy this liberty, he experiences a feeling of inferiority; and, by degrees, a most intense desire often succeeds to the greatest indifference.

Those who are forward to refer the propensity to transgress a prohibition of any kind to an unaccountable perversity, and unnatural corruption in human nature, as if it were not reconcileable to the known dominion of the ideas of pain and pleasure over the human mind, do an injustice to man's nature, in favour of their own indolence. Man, according to these superficial moralists, is a compound of inconsistencies: everything in him is an object of wonder; everything happens contrary to what they would expect: strangers to the few simple principles which govern human nature, the account they give of everything is, that it is unaccountable.

With respect to those parts of the punishment of excommunication which belong to the religious sanction, such as exclusion from the sacraments, their most striking imperfection is their extreme inequality: their penal effect depends on the belief and sensibility of the individuals. The blow which would produce torments of agony in one person, will only cause the skin of another to tingle. There is no proportion in these punishments, and nothing exemplary: those who suffer, languish in secrecy and silence; those who do not suffer, make a jest and a laughing-stock of the law in public. They are punishments which are thrown at hazard among a crowd of offenders, without care whether they produce any effect or none.

I speak of these punishments with reference only to the present life; for who is there that supposes that a sentence of excommunication can carry with it any penal consequences in a future state? For what man, reasoning without prejudice, can believe that God hath committed so terrible a power to beings so feeble and so imperfect, or that the Divine justice could bind itself to execute the decrees of blind humanity—that it could allow itself to be commanded to punish otherwise than it would have punished of itself. A truth so evident could only have been lost sight of by an abasement, which could only have been prepared by ages of ignorance.*

BOOK VI.

MISCELLANEOUS TOPICS.

CHAPTER I.

CHOICE OF PUNISHMENTS—LATITUDE TO BE ALLOWED TO THE JUDGES.

THE legislator ought, as much as possible, to determine everything relating to punishments, for two reasons: that they may be *certain*, and *impartial*.

1. The more completely the scale of punishments is rendered certain, the more completely all the members of the community are enabled to know what to expect. It is the fear of punishment, in so far as it is known, which prevents the commission of crime. An uncertain punishment will therefore be uncertain in its effects; since, where there is a possibility to escape, escape will be hoped for.

2. The legislator is necessarily unacquainted with the individuals who will undergo the punishment he appoints; he cannot, therefore, be governed by feelings of personal antipathy or regard. He is impartial, or, at least, appears to be so. A judge, on the contrary, only pronouncing upon a particular case, is exposed to favourable or unfavourable prejudices, or at least to the suspicion of such, which almost equally shakes the public confidence.

If an unlimited latitude be allowed to judges in apportioning punishments, their functions will be rendered too arduous: they will always be afraid either of being too indulgent or too severe.

It may also happen, that being able to diminish the punishment at discretion, they may become less exact in requiring proof, than if they had to pronounce a fixed punishment. A slight probability may appear suf-

* These observations might be much more extended, with reference to the details of ecclesiastical judicature, but the subject would not be of general interest. The foregoing observations may therefore suffice with respect to these laws, which are so generally condemned, and may serve to show the necessity for their formal abolition.

ficient to justify a punishment which they may lessen at pleasure.

There may, however, often arise, either with regard to the offences themselves, or the person of the delinquent, unforeseen and particular circumstances, which would be productive of great inconveniences, if the laws were altogether inflexible. It is therefore proper to allow a certain latitude to the judge, not of increasing, but of diminishing a punishment, in those cases in which it may be fairly presumed that one individual is less dangerous, or more responsible than another; since, as has been before observed, the same nominal punishment is not always the same real punishment — some individuals, by reason of their education, family connexions, and condition in the world, presenting, if we may so speak, a greater surface for punishment to act upon.

Other circumstances may render it expedient to change the kind of punishment: that which has been directed by the law may be incapable of application, or it may be less suitable in other respects.

But whenever this discretionary power is exercised by a judge, he ought to declare the reasons which have determined him.

Such are the principles. The details of this subject belong to the penal code, and to the legislative instructions to the tribunals.

CHAPTER II.

OF SUBSIDIARY PUNISHMENTS.

Of all the punishments which can be appointed by the law, there is none but what, from one accident or other, is liable to fail. It is obvious, that against such an event it becomes the law, in every case, to make provision. Such a failure may arise from either of two causes: unwillingness, that is, want of will to bear the punishment; or inability, that is, want of power.

The first cause, if no steps were taken to controul it, would naturally occasion the failure of all punishments, the execution of which is dependent upon the will of the party to be punished. This, among corporal punishments, is the case with all such as are either active or restrictive, one case of restrictive punishment excepted, that, to wit, in which the restraint is produced by physical means.

To give efficacy, therefore, to the mandate, of which any of these punishments is intended as the sanction, it is absolutely necessary that some further punishment should be appointed to back it through the whole of its continuance. In the first instance, this *backing* or *subsidiary* punishment, as it may be called, may be taken from those two classes, as well as from the other; and so through any number of instances, one behind another. A punishment of the active kind, for instance, might be backed by quasi-imprisonment; that, again, by banishment; or any one of those punishments, for a certain term, by the same, or another, (kind of punishment) for a further term. Ultimately, however, every such series must be terminated by some punishment that may be inflicted without the concurrence of the party's will; that is, by some punishment of the passive kind; or if of the restrictive kind, by such restraint as is compassed by physical means.

Even such punishments, to the execution of which (so the party be forthcoming) the concurrence of the party is not essentially necessary, may fail from his *want of power*, or in other words, from his *inability* to sustain them. This is the case with all corporal punishments, not capital, that affect any parts of the body that are not essential to life. It is the case, therefore, with simply afflictive punishments, and with discolourment, disfigurement, disablement, and mutilation, in as far as they affect any of the parts just spoken of. It is also the case with forfeitures of all kinds. The only punishments, therefore, that are sure, and require no others to be subjoined to them, are the above-mentioned corporal punishments, in the cases where the parts they affect are such as are essential to life; imprisonment, and such punishments by which life itself is taken away.

Even these, like any others, may come to fail by the want of will (in the party to sustain them,) to wit, by his not choosing to be forthcoming, which is a cause of failure common to all punishments. But then this cause does not necessarily produce its effect: it does not render the punishment of the man necessarily dependent upon his will, for he may be taken and punished in spite of his wishes and endeavours to prevent it; which, when a man does suffer any of these punishments, especially death, and those other acute and heavy punishments, is generally the case. In this case, the only resource is in forfeitures, upon the contingency of a man's having anything to forfeit, that is, within the reach of justice, or in the punishment of those whose feelings are connected with his own by sympathy, as in punishments *in alienam personam*.

From the differences above remarked, respecting the cause of failure in the punishment *first designed*, results a difference in what ought to be the quantity of the *subsidiary* punishment, concerning which we may lay down the following rules:—

Rule I. *Where inability is manifestly the only cause of failure, the subsidiary punishment should be neither greater nor less than that which was first designed;* for no reason can be given why it should be either less or greater.

Rule II. *Where want of will is manifestly*

the only cause of failure, the subsidiary punishment ought to be greater than that which was first designed; for the punishment first designed is that which by the supposition is thought the best: to determine the delinquent, then, to submit to this, in preference to the other, there is but one way, which is, to make that other punishment the greater.

Rule III. *When the cause of failure may be want of power, or want of will, as it may happen, and it cannot be known which, the subsidiary punishment ought to be greater than the punishment first designed, but not so much greater as in the case last mentioned.* This is apt to be the case with pecuniary forfeitures. If, however, it can be ascertained which of these is the cause, it ought always to be done; otherwise, on the one hand, he who fails from mere inability will be punished more than there is occasion; and he who fails wilfully, not enough.

When a man fails wilfully to submit to the punishment first designed for him, such a failure may be considered in the light of an offence. Viewing it *in* this light, we shall immediately see the propriety of the following rule:—

Rule IV. *The subsidiary punishment ought to be made the greater, the easier it is for the delinquent to avoid the punishment first designed, (without being detected and made amenable.)* For the punishment, to be efficacious, must always be greater than the temptation to the offence; and the temptation to the offence is the greater, the greater is the uncertainty of that punishment which is the motive that weighs against the profit of the offence.

Imprisonment is the most convenient and natural kind of subsidiary punishment, in cases where the offender cannot or will not submit to a pecuniary punishment. A circumstance that renders these two modes of punishment particularly apt for being substituted to each other, is their *divisibility:* they admit of every degree that can be desired.

Simple afflictive punishments, on account of the infamy they involve, cannot in general be eligibly employed as substitutes for pecuniary punishments.

In case of violation of boundaries of local confinement, the most eligible substitute is imprisonment. A single act of transgression may be taken as a sufficient warning that the penal mandate is not meant to be regarded

Laborious punishments require an uninterrupted train of attention, in order to compel the delinquent to submit to them. A constant supply of fresh motives is required: to produce the desired effect, it is necessary, therefore, that these motives should be drawn from a stock of punishment that is susceptible of minute division, and capable of being applied at the moment it is wanted. Thus, whenever an inspector is appointed in a house of correction in which the individuals confined are employed in hard labour, power is tacitly given to him to inflict personal correction. The infamy by which it is accompanied is not an objection; because, by the principal punishment—the penal labour—an equal degree of infamy is produced.

We have already observed, that to pecuniary punishment, in case of inability on the part of the patient, ought to be substituted imprisonment.

But by what standard are we to estimate a sum of money by a sum of imprisonment? for what debt, or part of a debt, is each day's imprisonment to be reckoned as an equivalent?

Let us say that the amount of the debt struck off by each day's imprisonment shall be equal to what each day the patient might have earned, had he remained in a state of liberty. The daily income of a mechanic, sailor, soldier, artist, labourer, servant, may be calculated according to the wages of persons employed in the same profession.

The daily income of a farmer may be estimated according to the 365th part of the rent of his farm. If, besides his farm, he is engaged in any other line of business, the daily benefit arising from that business must be added to the income arising from his farm.

The revenue of a man who is not engaged in any business, or is not a manufacturer, may be calculated as being eight times the rent of his house. If he is a manufacturer, at four times the rent of his house. If he is engaged in trade, at six times that rent.

The revenue of a man that boards and lodges in the house of another may be estimated at double the sum that he so pays. If he lodges only, at four times that sum. If he is supported gratuitously in the house of a relation, as equal to the value of his board and lodging.*

The points that then require to be determined, are the three following:—

1. The income being given, what portion of the debt shall be considered as being abolished by imprisonment of a certain duration?

2. From what period, anterior to the contracting of the debt, ought the value of the income to be estimated?

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* EXAMPLE.

Labourer, 1s. 0d. per day	— £15 : 13 : 0 per year	—	Debt discharged by seven years' imprisonment,	£109 : 11 : 0
Ensign, 3s. 6d. ,,	— 66 : 13 : 4 ,,	—	Debt discharged by a year's imprisonment,	66 : 13 : 4

3. What proofs ought to be required, by which to fix the amount of the income in question? It would be the interest of the debtor to make it appear as great as possible. During the examination, the creditor ought to be present, and to be at liberty, either by himself or his counsel, to examine the defaulter.

The more exalted a man's rank, the greater in general are his annual outgoings; the greater, consequently, ought to be the debt abolished by a given period of imprisonment.

I confine myself, then, to the laying down the principles upon which the calculation may be made: the details of their application belong more properly to the Penal Code than to a work on punishment.

CHAPTER III.

OF SURETY FOR GOOD CONDUCT.

The obligation of finding sureties for good conduct is an expedient, the utility of which appears more problematical in proportion as it is examined more nearly. A condition which is essential to it is, that there be an ulterior punishment destined to replace this obligation, in case its fulfilment is found impossible. This subsidiary punishment is ordinarily imprisonment: this imprisonment is ordinarily indefinite as to its duration; it may be perpetual, and it is natural that it should be so. Does the accused find himself without friends ready to risk their security upon his good conduct? Imprisonment, and the ignominy that accompanies it, are means little proper for enabling him to find friends so devoted.

Suppose that he finds them: what happens then? To a properly seated punishment, a vicarious punishment is added—a punishment to be borne by the innocent for the guilty. In the nature of things, any punishment might be equally well employed for this purpose. By custom, pecuniary punishment only is employed in the first instance, which, however, changes into imprisonment, in case of insolvability, according to a general rule. It is not, however, natural that a man, especially a man who, by the supposition, has given proofs of misconduct, should find friends who will expose themselves to be punished for actions over which they have no power, unless he have wherewith to indemnify them for bearing this pecuniary punishment. Does he find them in this case? Then this expedient is useless: it would have been quite as well to have fixed the amount upon him directly. In order that this expedient may have an efficacy of its own, it will be necessary to limit its use to the case in which the incapacity of the accused to furnish this indemnity is known. Does he, after this, find any persons sufficiently generous thus to expose themselves for him? It is, without doubt, something gained in point of security; but it is a security very dearly bought. In all other cases, this expedient resolves itself into a question of account.

The support which the law receives from this expedient, springs from two sources: it operates as an additional punishment, whereby the will of the accused is influenced—this punishment consisting in the remorse which a generous mind would feel in seeing friends, who had devoted themselves for him, plunged into misfortune by his ingratitude. It is also an expedient whereby he is attacked upon the side of power: his sureties become guards, whom the danger to which they are exposed induces to watch over his conduct.

But will he, whom the fear of punishment to be inflicted upon himself has been found insufficient to restrain, be restrained by the fear of a less punishment to be inflicted upon another? Those passions which have stifled the voice of prudence, will they obey those of generosity and gratitude? They may obey it; but that they will not obey it is, I think, most natural: but if this is so, it is a very costly expedient. In the majority of cases, instead of ensuring the good of prevention, it will produce the evil of punishment—of punishment borne by the innocent.

Whilst, as to this guard, it is a security much more verbal than real—it would be a very weak security, even if the individuals were his companions, and lived under the same roof with him at all times. But it is not among such as these that sureties are selected: they are, under the English law, required to be householders, having separate establishments. Is it, then, possible, that the passion which, by the supposition, had broken through the united restraints of prudence, gratitude, and honour, should be restrained by so loose a hand? Besides this, is it natural that the extremes of confidence and mistrust should be united in the same person?

The bitterness of this punishment, to which the innocent are made to expose themselves, is not taken away by calling the exposure voluntary. This willingness is owing only to the constraint which the consideration of his friend being sent, or about to be sent, to prison for life, brings with it: it is a willingness produced by torture.

In conclusion, everything in a measure which ought not to be resorted to without very evident necessity, if it is unnecessarily with any other consideration than that of exposing the sense of individuals to have confidence, which is a source of confidence, may give birth to sources which [illegible] only with life.

This expedient is seldom employed under the English law, but rather has recourse to

to exist only in connexion with judicial commination. A certain fine is determined on: the accused is made to say, I consent to the payment of this fine, if I commit a certain offence. One or more sureties are made each to say, I consent, on the same condition, to owe the same, or a part of the same sum. In this manner, as if an inevitable punishment required an extorted consent to its infliction, the accused himself is made to contract an engagement, which, if it is not always ridiculous, it is that it is sometimes unjust. Implying a claim upon his property, it serves to rob his creditors of their just rights to payment of debts contracted between the period of the engagement and the contracting of the debt.

Of this ill-contrived compound mischief, what are the effects in practice? very commonly, none. This formality is complied with, as so many others are complied with, without thinking of what it means, partly from duty, and partly from habit. Sometimes it may be useful, because it always includes admonition, and sometimes threatening, according to the proportion between the fine threatened, and the punishment which would have had place without it: sometimes, for want of sureties, it may be believed that the accused himself may go to prison: sometimes, after having found them, it may equally be believed that they may incur the fine, and that they pay it, or go to prison, with or without him. Do these misfortunes frequently happen? I know not. How can I know? This is one of those thousand things on which everybody ought to be instructed, and of which no one can find an opportunity of learning the truth.

CHAPTER IV.

DEFEAZANCE OF PUNISHMENT.

§ 1.—*Of Pardon.*

It is necessary to increase the magnitude of a punishment in proportion as it is wanting in certainty. The less certain your punishments are, the more severe they must be; the more certain your punishments are, the more you may reduce their severity.

What shall we then say of a power expressly established for rendering them uncertain? I mean, the power of pardoning: it has cruelty for its cause; it has cruelty for its effect.

Among nations, as among individuals, the government of the passions precedes that of reason. The object of primitive punishments was to assuage the rage of their authors. Of this there are two proofs: the first is drawn from the multitude of cases in which the most severe punishments have been lavished upon actions which have but a slightly hurtful influence upon the happiness of individuals or society, and with respect to which, such evil influence was not sought to be established till long after these punishments were appointed: of this kind are the punishments directed against heresy. The second is drawn from the praises lavished upon clemency: for whilst the effect of an offence is only to enrage the sovereign, there is merit in his abstaining from punishing it. There is utility in his so doing, for by a privation which is borne by him alone, he spares the infliction of terrible evils upon a multitude of persons. In this consists the difficulty; for it is difficult for a man accustomed to follow the bent of his inclinations, to restrain them. Suppose the effect of a crime is to interrupt his ease, and the effect of the punishment is to repress this crime: to abstain from the application of this punishment is a treason of which the most pardonable sources are feebleness or folly. To praise the clemency of the sovereign upon this supposition, is to praise the surgeon who allows his patient to perish by not cutting off a gangrened finger. Among sovereigns, therefore, without cruelty, the use of unmerited pardons could not take place: the reason is, an enlightened love of the public welfare does not engage him in undoing with one hand what he had done with the other. If the punishments have not had, for the cause of their establishment, cruelty towards individuals, it is cruelty towards the public to render them useless—to violate his promise, the engagement which he has made to the laws to put them in execution.

I speak here of gratuitous pardons, such as all pardons have hitherto been. There are cases in which the power of pardoning is not only useful, but necessary. In all these cases, if the punishment were inflicted, the evil produced would exceed the good, and, in some cases, almost infinitely. If the legislator could have known that certain individual cases would or would not be included in the general case in which he would have wished that the punishment should cease, he would act unwisely were he to rely upon any other person for its cessation. For why should he give to another a power to frustrate his designs? But he does not possess this knowledge, unless, in quality of legislator, he acts also in that of a prophet. It follows, therefore, that he must rely upon some other.

In English law, one method by which the law gives to a party injured, or rather to every prosecutor, a partial power of pardon, consists in giving him the choice of the kind of action which he will commence. On this, or on the difference between the actions, depends a difference between the punishments: so far as the happening of this difference is

concerned, the lot of the offender depends not on the gravity of his offence, but on some other foreign circumstances; such as the degree of the ill-will of the party injured, or other prosecutor, or of the knowledge of his legal advisers. The judge is a puppet in the hands of any prosecutor, which he can cause to move at his pleasure and caprice.

There are many persons, as we have seen, who exercise the power of pardoning: there are many others who possess it, who are not observed.

Among the latter class may be placed those who have the power of placing nullities in the course of procedure. In England, an attorney, or his clerk, any copying clerk at eighteen-pence or two shillings per day, may grant or sell impunity to whomsoever it seems them good.

If the individual injured can directly, or indirectly, put an end to a criminal process, otherwise than by the punishment before the judgment has been pronounced, and, in case of conviction, executed, he enjoys in effect this right of pardoning. The right of remission is, then, one branch of the power of pardoning. When the interest of the public requires that the punishment should take place, the individual injured ought not to enjoy this right: when this interest does not require it, he may enjoy it.

This power may be allowed in all cases, when the offence on which it operates, being founded only in a private quarrel, does not spread any alarm through society, or at least does not spread any alarm which the conduct of the parties does not destroy.

But in the case of corporal injuries, how trifling soever, and especially in the case of injuries accompanied with insult, this remission ought not to be allowed without the knowledge of the judge; otherwise the weakness and good-nature of some minds would serve to draw down upon them vexation from hardened oppressors.

Homicide is a case in which the power of remission ought not to be allowed to any one in particular. It would, in effect, be to grant to him an arbitrary power over the life of those whose death he might thus pardon: he might boldly employ any assassin, by exercising in favour of that assassin his power of pardoning.

If to grant to any one whatsoever, the power of taking away a reward offered by the legislator, would be regarded as an absurdity, to grant the power of taking away a punishment in the opposite case, with the reserve of specific exceptions, would be a more terrible absurdity.

This absurdity is not found in the system of rewards: no person proposes to take away a reward after the legislator has offered it; the nullities, however, allowed in prosecutions, when he has appointed a reward for offenders, operates to this effect in the case of punishment.

The frequency of capital punishment is one of the most probable causes of the popularity of pardons.

In England, it may therefore admit of debate, whether the legislature has done most evil by appointing so many capital punishments, or the sovereign, by exercising his power of remitting them.

The essence of this power is, to act by caprice. The king, as it is falsely said,—the deputy of the king, as it ought to have been said—does not act judicially: he does not act from a knowledge of the matter; he has not the power of doing so; he has not even the power of compelling the attendance of witnesses. Is a lie told before this powerless despot? it is an unpunishable lie.

The power of pardoning is often said to be one of the brightest jewels in the royal crown: it is burdensome as it is bright, not only to those who submit to the crown, but still more so to him also who wears it.

Many cases have occurred in England, in which the counsellors of the crown have, from more or less praiseworthy motives, made use of this lawful despotism of the king, to soften the tyranny of the laws. Never was power so undoubtedly legal, though undue, employed for a mere legitimate purpose:—the result, however, has been, not that the minister has been applauded as he deserved, but that he has become the object of clamour, libels, and threats. The most correct and legitimate exercise of the powers impolitically attached to his character, has only served to draw down upon the king that treatment which a tyrant would have merited.

How much discontent and fear would have been spared, if a right, legally abusive, had given place to an enlightened and well-ordered law!

§ 2. *By Length of Time.*

Ought punishment, in any cases, and in what, to be defeasible by length of time—by the time, I mean, that has elapsed since the commission of the offence?

At first view, the answer seems to be clearly in the negative; for what, it may be said, has the circumstance of the length of time to do with the demand there is for punishment?

Upon a nearer view, however, it will be found, that the utility of prescription in certain cases is maintainable by specious, at least, if not conclusive arguments.

As a foundation for these arguments, it must be admitted, that if in any case the suffering of the delinquent is not necessary for the attainment of the ends of punishment, the punishment ought not to be inflicted.

This being premised, it should seem, that

in a view to one of the ends of punishment, to wit, reformation, the execution of it after a certain length of time is not necessary. A certain number of years, suppose ten, has elapsed since he committed the offence: now then, in all this time, either he has committed similar offences, or he has not. If he has not, he has reformed himself, and the purpose of the law has been answered without punishment: if he has, he has been punished for subsequent offences, and the discipline he stood in need of has been already administered to him, at a time when he stood more in need of it than he can be supposed to stand at present.

Thus stands the argument upon the ground of reformation: but of the facts alleged, one, it must be confessed, is rather problematical. If a man commit an offence, and is forthcoming ten years afterwards, it is by no means clear, from his not having been punished for any similar offences, that he has not committed any. In the same manner that he escaped detection or prosecution for the first, he may have escaped detection or prosecution for any number of other similar offences. The difficulty of detection, the death of witnesses, the subtleties of procedure, are circumstances that afford ample grounds for disputing the force of the inference, from his not having incurred punishment, to his not having deserved it.*

Upon the ground of example, there is still less to be said in favour of prescription. If the prescription is not to take place till at the end of a long period, as ten years (the number above taken for an example), it will not contribute, in any assignable degree, to lessen the apparent value of the punishment. When a man meditates a crime, his great fear is the being detected and apprehended, immediately almost upon the commission of it. The taking away the danger that would await him at the end of ten years, will add very little to his security.†

When a crime has been committed, either the person only who committed it may remain unknown, or the *fact*‡ itself, as well as the *person*. If either be unknown, it is plain no prosecution can have been set on foot: if both be known, then either a prosecution may have been set on foot or not. It is only in case of there being no prosecution, that prescription has ever been allowed. The rule is, that a man shall not be prosecuted after that interval has elapsed — not that, if he has been prosecuted and convicted, he shall not suffer.

The apprehension of danger commences at the time of the discovery. Persons who are about the criminal now understand that they have among them a thief, a robber, or a murderer: this cannot but give them some alarm. If no punishment at all is to be inflicted on him, if he is suffered to go on and live where he did before, how is this alarm to be quieted?

In crimes, the object of which is a pecuniary profit, prescription ought not in any case to operate so as to protect the delinquent in the enjoyment of his ill-gotten acquisition.

Neither ought it to operate in such manner as to leave innocent persons exposed to suffer from their terror or abhorrence of the criminal.

There are also certain crimes, in respect of which prescription ought not to be adopted in any case. Such are three species of homicide: viz. homicide for lucre, through wantonness, or from premeditated resentment; incendiarism; and the offence of sinking a vessel manned, or of laying a country under water. The mischief of crimes of these kinds is so great, that it seems paying too great a regard to the interests of the criminal to adopt a rule that may contribute, though in ever so small a degree, to lessen the apparent certainty of the punishment; and the horror or terror a fact of any of those kinds inspires when discovered, is so great, that that circumstance alone seems enough to overweigh any good that could be gained by it.

What is the good in view in prescription? It is the interest of one single person that is in question — the delinquent; the sparing of that single person from a suffering which it is supposed it may, in the case in which it is proposed the prescription should take place, not be necessary, at least not so necessary as formerly, to the purposes of punishment to inflict. Now, when it is a crime by which men are exposed to suffer in their individual capacities, it can scarcely be detected, but a multitude of persons must begin to suffer; to wit, by the apprehension of his committing other such crimes in future, of which they may chance to be the objects: and this suffering of theirs will continue till he be manifestly disabled to hurt them; the least penal method of doing which, is to send him out of the way.

Upon this slight examination, we perceive that the utility of prescription will vary greatly in respect of different offences. To discuss this topic completely, it would be necessary, therefore, to consider it with a

* Any one who is at all conversant with anecdotes of notorious criminals must have observed, that nothing is more common in this country than for a man to be guilty of twenty, thirty, or forty thefts or robberies, before punishment overtakes him.

† Mr. Bentham does not appear to have carried on his examination of this subject in respect to the other ends of punishment. — ED.

‡ Under the name of the fact, I would here include such and so many circumstances as are necessary to make the act in question come under the denomination of some crime.

view to the several sorts of offences. To do this fully, belongs not to our present subject: all we can do in this place is to offer a few general hints, just to put us in the way, and to serve as a clew to indicate the principal points upon which the inquiry ought to turn.

Whether a given person, detected, after such a length of time, of a crime of the sort in question, is or is not an object of terror to those around him, is a question that can be answered only by a particular inquiry: it is a matter, therefore, that ought rather to be committed to the magistrate who has the power of pardoning, than to be provided for by a general law.

§ 3. *By Death of Parties.*

In pursuit of (the means of making) compensation, the business of punishment is apt to be overlooked. When one man, the party injured, is presented with what another man, the injurer, is made to pay, men are apt to take it for granted, and at first asking would be apt to answer, that there is no punishment in the case. They imagine, but hastily and erroneously, that the only person who has suffered by the offence is that party who is the immediate object of the injury. If, then, that person, by an operation of law, be made to enjoy as much as by the offence he had been made to suffer, they conclude (and justly enough, were the foundation true) that everything is set to rights, and that the law has nothing more to do. The pain which the offender is made to suffer by being made to give up what the party injured is made to enjoy, they do not look upon in the light of punishment. They look upon it as a circumstance resulting, accidentally and unintentionally, out of the operation by which an indemnification is produced to the injured party, so that it would be but so much the better if that pain could be altogether spared; and it is for want of being able to save it, that it is suffered to exist. In short, so entirely is the idea of punishment lost in that of compensation, that a law which appoints the latter, is not understood to appoint the former; is not looked upon as a *penal* law.

Punish, however, it must. A penal law, in one sense of the word, it must be, if it is to have any effect at all in preventing the practice which is productive of the mischief it means to cure; and it is by *punishing* that it does more good than by *indemnifying*. For of the two ends, prevention and compensation, the former, as has been proved, is by much the most important.

This neglect, however, of the principal end of laws made in restraint of private injuries, has not been attended with all the ill consequences that might at first sight be imagined. The indemnification being made to come out of the pocket of the aggressor, has produced the punishment of course. Now, under the laws of most nations, in most instances of acknowledged injuries, indemnification has been exacted, and by that means, in most cases, it has happened that punishment has been applied. Yet not in all; because compensation has been made defeasible by contingencies: I say in most, but it has not in all; for there are two events by which in all these cases indemnification is rendered not necessary in so great a degree as it was before, and, as it may appear upon a superficial glance, not necessary at all. In effect, upon the happening of either of these two events, under most laws, and particularly under our own, the obligation of making compensation has been cancelled. At the same time, compensation being the only object in view, this being taken away, punishment has of course dropped along with it. But in these cases, as I hope soon to make appear, howsoever it may stand with compensation, the demand for punishment has not been lessened by either of the events in question.

These are — 1*st*, The death of the injurer; 2*dly*, The death of the party injured.

1. The death of the injurer has been deemed to take away the occasion for indemnification. The reason that occurs is, that there is nobody to give it. Had he continued alive, he ought to have given it, doubtless; but as he is gone, who ought then? why one person rather than another?

To answer these questions at large, we must make a distinction according to the nature of the offence. The offence is either attended with a *transferable* profit, a fruit transmissible to the representatives of the offender, or not. In the first case, the obligation of making compensation ought clearly to devolve on the representative, on the score of punishment, if on no other. In the latter case, there would still be one use in its being made to devolve on the representative, as far as the possessions he inherits from the party deceased extend, though not so great a use as in the former case.

Where the profit of a transgression is transmissible to a representative, the obligation of restoring the amount of it ought likewise to devolve on him: if not, the punishment would not, in the case in question, be equal to the profit; in fact, there would be no punishment at all, no motive for the party under temptation to abstain from it. It may occur for the first moment (but it will soon appear to be otherwise) that neither will there in contemplation of this case be any temptation; for if the injurer thinks himself about to die, there will be an end of the profit of the injury. But this is not the case: should he be made to lose it ever so soon himself, he may transmit it to those who are dear to him, so that the pleasure of sympathy, grounded

on the contemplation of their enjoyment, is a clear force that acts without controul, and impels him to transgression. Besides this, the delays and uncertainty of justice add still to the force of the temptation. If he can contrive to spin out the suit so long as he lives, the whole business, from beginning to end, is clear gain to him.

2. Even though the profit of a transgression be not of such a nature as to be transmissible to a representative, there seems still to be a reason why the obligation of making amends ought to devolve on the representatives, as far as they have *assets*.* Such an arrangement would be eligible, as well on account of punishment as of compensation:

On account of compensation, for the following reasons: The mischief of the transgression is a burthen that must be borne by somebody: the representative and the party injured are equally innocent in this respect — they stand upon a par; but the representative would suffer less under the same burthen than the party injured, as we shall presently perceive. From the moment when the injury was conceived, the party injured, in virtue of the known disposition of the law in his favour, entertained *expectations* of receiving amends. If these expectations are *disappointed* by a sudden and unforeseen event, like that of the delinquent's death, a shock is felt by the party injured, such as he would feel at the sudden loss of anything of which he was in possession. The eventual representative entertained no such determinate expectations: what expectation he could entertain in the lifetime of his predecessor, respected only the clear surplus of his fortune — what should remain of it after the deduction of all charges that might be brought upon it by his misfortunes, his follies, or his crimes.

On account of punishment, for the following reason: The punishment of the delinquent in his own person is a punishment which fails upon his death: the burthen thrown upon those who are dear to him, extends his punishment, as it were, beyond the grave. Their suffering, it is true, will, for the reasons above given, not be very considerable; but this is what the bulk of mankind are not apt to consider. It will be apt, therefore, in general, to appear to him in the light of punishment, and will contribute to impose a restraint on him in a case in which, otherwise, there would be none. Nor will this advantage, in point of punishment, be charged with that *expense*, which renders punishments *in alienam personam* generally ineligible; for when the burthen is made to rest on the representative who has assets, there is less suffering, as we have shown, upon the whole, than if it were to rest upon any other person.

The law of England on this head is full of absurdity and caprice. The following are the instances in which (the heir is permitted to enrich himself by the wrong-doing of his ancestor) a man is permitted to enrich his heir with the profit of his crimes:† By the wrongful *taking* and withholding of any kind of moveables, while, if it had been by only *withholding* money due, the heir must have refunded; — by the waste committed on immoveables, in which he has only a temporary interest;‡ — by selling to a prisoner for debt his liberty;—by embezzling property entrusted to him by will, though, if he had not broken any such confidence, but had intruded himself into the management of the dead man's property without warrant, the heir must have refunded;—in short, by any kind of injurious proceeding, where the compensation, instead of being left to the discretion of a jury, is thought fit to be increased and liquidated by a positive regulation.

The death of the party injured is another event upon which the obligation of making amends is very commonly made to cease; but with full as little reason, it should seem, as in the former case. The death of the party in question is a contingency which does not at all lessen the demand there is for punishment. For compensation, indeed, the demand is not altogether so strong in this case, as in the former: the person who was the immediate object of the injury, entertained a prospect of reaping, in present, the whole profit of a compensation he expected to be adjudged to him: his representative did not, during the lifetime of the principal, entertain so fixed a prospect; he, however, entertained a full prospect of some compensation to be made to his principal; and he entertained a prospect of a part, at least, of that compensation devolving upon himself, subject to the contingencies to which his general expectations from the principal were exposed. This expectation is more than any one else was in a situation to entertain; so that there is a better reason why he should reap the profit of the punishment, than why any one else should.

The law of England has been more liberal

* Assets: Effects descending to them from the ancestor, and liable to alienation.

† In all these points, I depend upon the authority of Comyns' Digest, I. 262, 263.

‡ A person whom I know, having the immediate reversion of an estate, part in houses, part in land, rented the land of a person who had the life-interest in both. The life-owner letting the houses go to ruin, the reversionary, to indemnify himself, stopt the rent of the land. The life-owner died without repairing the houses, as he was bound: the consequence was, that the reversioner (as he was advised, to his great surprise), though obliged to pay his rent, lost his remedy for the waste.

in the remedies it has given *to* the heir of the party injured, than in those which it has given against the heir of a wrong-doer. It gives it to the heir in all cases, as it should seem, of injuries done to the *property* of the ancestor. It denies it, however, in the case of injuries to the person,* be they ever so atrocious; and, probably, in the case of injuries to the reputation. This omission leaves an open door to the most crying evils. Age and infirmity, which ought, if any difference be made, to receive a more signal protection from the law, than the opposite conditions of life, are exposed more particularly to oppression. The nearer a man is to his grave, the greater is the probability that he may be injured with impunity, since, if the prosecution can be staved off during his life, the remedy is gone.† The remedy, by a criminal prosecution, is but an inadequate *succedaneum*. It extends not to injuries done to the person through negligence, nor to all injuries to the reputation: it is defeasible by the arbitrary pleasure and irresponsible act of a servant of the crown: it operates only in the way of punishment, affording no compensation to the heir.

After so many instances where no satisfaction is exigible from the heir for transgressions by which he profits, no one will wonder to find him standing exempt from that obligation in the case of such injuries as, being inflicted commonly, not from rapacious, but merely vindictive motives, are not commonly attended with any pecuniary profit. Such are those done to the person, or to the reputation, or in the way of mere destruction to the property. So accordingly stands the law;‡ though there are none of them by which the injurer may not, in a multitude of cases, draw indirectly a pecuniary profit: for instance, in the case of a rivalry in manufactures, where one man destroys the manufactory of his more successful rival.

APPENDIX — ON DEATH-PUNISHMENT.‖

JEREMY BENTHAM TO HIS FELLOW-CITIZENS OF FRANCE.

§ I. *Introduction.*

FELLOW-CITIZENS! — Hear me speak a second time!

1. Among the topics of the day § I behold the punishment of death. Shall it be abolished?

2. This question is of the number of those which for threescore years or thereabouts have been familiar to me: for these eight-and-twenty years my thoughts on subjects of this nature have had the honour and good fortune of being viewed among you with eyes not altogether unfavourable: of these thoughts some there are, which, if capable of being of use at any time, present a better chance of being so at the present than at any other; and, moreover, as not being very likely to make their appearance from any other quarter. Put together, these reasons will (I flatter myself) be regarded as affording a tolerably sufficient warrant for this address.¶

3. Now, then, as to this same question. The punishment of death — shall it be abolished? I answer — *Yes*. Shall there be any exception to this rule? I answer, so far as

* 1 Comyns' Dig. 261.

† A man may be kept in gaol, and his fortune ruined by it; and if he die under the imprisonment, his family are without remedy. In some cases, the wrong-doer may not even be punishable by a criminal prosecution; or he may be maltreated in such a manner as to contract a lingering distemper, such as does not follow from the injurious treatment with sufficient speed and certainty to bring it within the crime of murder. If the prosecution can but be staved off till he die, his family are without remedy. Many years ago, a butcher was committed to Newgate, at a time when the gaol distemper was raging in that prison, upon a false and malicious charge of theft. He died there, leaving a large distressed family, who were altogether without remedy for this atrocious injury.

‡ I rest still on the authority of Comyns, except in the case of injuries to reputation, in which I conclude from analogy, Comyns being silent.

‖ In France, while this paper was writing, two mutually connected questions were on the carpet: — the *general* question — shall death punishment, in any, and what cases, be employed? — the *special* question — shall it be employed in the case of the Ex-Ministers? The lot of these men being now disposed of, the matter which applied exclusively to their case has been struck out.

§ [*the day*] — namely, December the 17th, 1830.

¶ Not less than fifty years ago, had already issued from the press a work of mine, in which the properties desirable in a *lot of punishment* are held up to view: — meaning, by *a lot of punishment*, the quantum of it attached to the species of offence in question: and, with the requisite assortment of these properties, *death* punishment is not of itself endowed. But, as no objection to the use of this *one* instrument in particular is constituted by a deficiency which is capable of being filled up by the addition of *others*, the demand for the consideration of this mode of punishment, on this present occasion, has not been found superseded by anything that is contained in that former work, — or in any by which it has been succeeded, *in that same or any other language*.

regards *subsequential* offences, *No:* meaning, by *subsequential*, an offence committed on any day subsequent to that which stands appointed by the law, as that after which no such act of punishment shall be performed.

4. Meantime, on the part of rulers, general custom — general at least, not to say universal — delivers its testimony in favour of this punishment. This considered, a consequence is — that to justify the abolition of it, determinate reasons are requisite: this I cannot but acknowledge.

5. Well, then, various features of inaptitude — features peculiar to itself — features such as, when taken together, will be seen to be absolutely conclusive—I have to charge it with. *Inaptitude* is a term of reference:— subject-matter of reference, the *end in view*. *End in view*, on the present occasion, prevention of the like acts of maleficence in future. This is, at any rate, the *main* end: any *others*, of which mention may come to be made, will be seen to be of no other than *subordinate* importance.

6. Features of inaptitude, or say, in other words, *bad properties*. Here they follow:—

I. Bad property the first — *Inefficiency:* — comparative inefficiency—inefficiency, in comparison with other modes of punishment.

II. Bad property the second — *Irremissibility:* — incapacity of being remitted as to the remainder, after a part has been undergone.

III. Bad property the third — *Positive maleficence:* — *tendency to produce crimes.*

IV. Bad property the fourth — *Enhancing the evils produced by ill-applied pardon.* — Under these several heads, explanations will follow.

7. In favour of this punishment — in support of it against the argument afforded by the proof of all these its bad properties — the only argument adducible will be found to be — that presumption of its aptitude which is afforded by the extensiveness, as above, of the acceptance given to it. This presumption will be seen repelled, by indication made of the *sources* of the attachment to it thus manifested by rulers — sources, among which will not be found any experience of its comparative conduciveness to the only proper ends to which it is or can be directed.

8. To the proof of the bad properties thus charged upon it, you will see added the proof afforded of its *needlessness:* afforded—by experiments actually made, and the experience thereby obtained.

Should all these truths be rendered manifest and incontestable, can any further reason or argument in support of the proposed abolition of it be desired?

9. But, in and for the cases in which, at present, application is made of it, a *succedaneum* to it will be necessary. A succedaneum preferable to it in every imaginable particular will accordingly be indicated, and proposed for your consideration.

§ II.—I. *Bad property the first—Inefficiency.*

I.—1. Now, then, for bad property the first —*Inefficiency:* that is to say, with reference to that same *end in view*, namely, prevention of acts similar to that in consideration of which application is made of it: I mean, acts on the part of individuals, other than the one to whom, on the individual occasion in question, it is applied; for, as to that one, the efficiency of it in this respect cannot (it must be confessed) be disputed.

2. Causes of this inefficiency, these —

1. *Cause the first.* On the part of the several descriptions of persons whose co-operation is necessary to the conviction of the criminal, reluctance as to the performance of their respective parts in the melancholy drama. These persons are —

i. The Informer or Informers.
ii. Prosecutor or Prosecutors.
iii. Witnesses.
iv. Judges.
v. Where Jury-trial is in use, Jurymen.

In any one of these several situations, let but the necessary service be withheld, the denunciation made of this punishment fails of being productive of the preventive effect looked for and endeavoured to be produced.

3. II. *Cause the second.* On the part of the delinquent himself — that is to say, on the part of persons at large, considered as standing exposed to the temptation of becoming delinquents in this shape — comparative *insensibility* to the danger of punishment in this shape: — as to this matter, presently

4. Look first at cause the first. Prodigious is the counteracting force with which you will see this same reluctance tending to destroy the efficiency of *this* mode of punishment: — prodigious, in comparison of that with which it acts in relation to any *other* mode.

5. And, as the dissocial affections decrease in strength, and the social increase — in a word, as civilization advances — the reluctance to contribute to the infliction of this punishment will increase: so, therefore, in the eyes of the individual in question, the apparent improbability of its infliction, and thence in his instance the probability of its being without effect.

6. Now for a measure of the degree of this same reluctance. Would you have an instructive one? Take, for the subject-matter of observation, a place, in which sympathy, for sufferings ordained by law, may be stated as being at its minimum — the heart of an English judge.

7. Case, prosecution for theft. Subject-matter, nine and thirty pieces of gold; value, nine and thirty *pounds* sterling: Judge's charge, — Gentlemen of the Jury, find the

value nine and thirty *shillings*. Note, that, in England — the verdicts of jurymen are given on their *oaths;* and that the breach of an oath is termed *perjury;* and to induce a man to commit perjury, is termed *subornation of perjury*.

8. For what purpose, then, this subornation? For the purpose of preventing the execution of the law: — that law which *he* too is *sworn* to execute. Why thus seek to prevent the execution of the law? Because, by the law in question, where the value of the subject-matter of a theft was as high as forty shillings, no less punishment was allowed to be inflicted than a sort of *olla podrida*, called *felony*, of the ingredients of which death was one: and at the expense of this compound of perjury and subornation of perjury, and not otherwise, the substitution of a different punishment to death-punishment, on these terms, and no others, was effectible. Recommendation, given to a jury — to this effect, and with this effect — has long been a common practice.

9. When such is the reluctance, in a heart of such hardness as that of an English judge, steeled against all generous affections by sinister interest with the accompanying prejudices, think what it must be in a heart of average consistence, in the several other situations above mentioned.

10. Fellow-Citizens! who can now doubt but that, of the reluctance thus produced, impunity in vast abundance must have been the effect? And of the impunity, increase in the multitude of the several crimes: effect *actually* produced, the reverse of the effect *intended*, and supposed to be produced?

11. Is there any other punishment, in regard to which any such reluctance can be seen to have place? No, not one.

12. Think of the multitudes of men, of so many different classes, whose breasts one inclination or other employs itself in hardening against impressions from the fear of sufferance in this shape.

I. Military men, against death by warfare.

II. Men of education, against death by duelling. In this case, the fact of the insensibility is out of dispute: its propriety is a consideration that belongs not to the present purpose.

III. Seafaring men, of the non-military, as well as the military class.

IV. Men engaged for subsistence, in various occupations, in greater or less degree *unhealthy*.

But — why all this rambling? this resort to other countries? The question is a local one. Insensibility — to what? to the fear of death. In what place? In the hearts of Frenchmen. Wanted, for the occasion, a measure for the force of this quality. Fellow-Citizens! would you have a correct one? Look at home: Look at the work of the *Three Days!*

§ III. — II. *Bad Property the second — Irremissibility.*

1. For this purpose, punishments may be distinguished into *continuous* and *instantaneous:* continuous, those which, being in their nature capable of continuing to be inflicted and suffered, for and during a length of time more or less considerable, may, after having been suffered for and during a part of that same time, be made to cease as to what remains of them: instantaneous, such of which, if any part is suffered, so is every other part. Of the instantaneous, and in this sense, of the irremissible sort, is (as every one sees) death punishment.

2. By *remission*, understand — not prevention of the *whole*, but, after a part has been already undergone, prevention of the remainder.

3. Whatsoever, on the occasion in question, may be the demand for the *remission* of the punishment — death-punishment being thus instantaneous, is not capable of being remitted; consequently, in every case in which justice requires such remission, it is productive of injustice.

4. Of occasions, on which it may be manifestly desirable, that the punishment which a man has been sentenced to suffer should thus be remitted, — examples (you will see) are these: —

I. Discovery of the innocence of the supposed criminal.

II. Special service, in some determinate shape, capable of being rendered — by the criminal in question, and not by any other person.

III. Indication, for example, of evidence probative of *delinquency*, in any shape, on the part of some other person.

IV. Or, of *innocence* on the part of some other person, who otherwise would have been convicted of delinquency, no matter in what shape.

V. Special service, in any other shape whatsoever, in which service can be rendered to mankind.

5. Death-punishment is thus rendered unapt — in comparison, not only of all *continuous*, but of other *instantaneous* punishments; for, in the case of every such punishment — mulct, pillory, whipping, for example — after the punishment has been undergone, there the man is, in a capacity of receiving satisfaction, in the shape of compensation, and whatever other shapes may be indicated — by the nature of the supposed offence committed, the punishment undergone, and the circumstances of the individual sufferer; in such sort that, suffering and satisfaction taken together, he may be — not a sufferer, but rather a gainer, upon the balance of the account.

6. And note — that, at the charge of some fund or other, *satisfaction* in the *pecuniary* shape, say in one word *compensation*, the

man should be made to receive, in every case; that is to say, at the charge of individual witnesses and prosecutors, one or both, wherever the falsehood, by which the conviction was produced, had *evil consciousness* or *temerity* for its accompaniment on their part: failing that *private* fund — then at the charge of the public fund.

7. And thus it is — that, not only is death-punishment a punishment, of the infliction of which irreparable wrong may be the consequence; but it is the *only* mode of punishment of which so deplorable a result is a necessary consequence.

8. The comparative inefficiency of this punishment, in consequence of men's reluctance to contribute to the infliction of it, has just been brought to view. To that same inefficiency, this same irremissibility cannot but be, in a greater or less degree, contributory. By the thought — that, should the suffering which his testimony, if given, will be productive of, turn out to be wrongful, the wrong will be irreparable, — can it be, but that a man will be restrained from delivering such testimony, on many an occasion on which he would have delivered it, had the punishment been of no other sort than one, of which, if eventually found undue, the remainder might be remitted, — and, for the part already undergone, reparation made? Reader! whoever you are, put this question to yourself, and make answer to it.

§ IV. — III. *Bad property the third — Tendency to produce Crimes.*

1. Now comes bad property the third — *Tendency of this punishment to produce crime.* Paradoxical as it may seem, — the proposition by which this property is attributed to this same punishment, is not the less true. For this so extraordinary a property, it is indebted to its capacity of being applied to the *extinction of evidence.* For, you will see immediately, whatsoever evil is producible by *false* evidence, that same evil is producible by extinction of *true* evidence.

2. By false evidence, a man may be invested with a right that does *not* belong to him; he may be divested of a right that *does* belong to him: so, therefore, may he by extinction of true evidence.

3. By false evidence, a guiltless man may be made to suffer punishment, whether in the shape of death-punishment, or any other; a guilty man may by acquittal be exempted from all punishment — and, unreclaimed, let loose upon society, to add to the number of his crimes. So likewise may evil in these shapes be produced, by extinction of true evidence.

4. But, if any sort of crime there be, to which death-punishment is attached, — then so it is — that, by prosecution, as for a crime of that sort, with false evidence for the support of it, and conviction thereupon pronounced, may a man be put out of the way, — and the evidence, which he would have delivered on the occasion of such other suit, extinguished.

5. In this case, here is a man, who has been seduced and converted into a murderer. Seduced? and by whom? Even by the law herself, who has thus put arms into his hands, having prepared the judge and his subordinates to serve him in the character of instruments and accomplices. And thus it is — that, by means of death-punishment, may be produced — wrongs and crimes to any amount, which would not otherwise have had place.

6. In a word, death-punishment puts it in the power of any ill-disposed person, by extinction put upon true evidence, to produce any evil, producible by him by means of false evidence. By no other mode of punishment can evil, in this shape, be produced.

§ V. — IV. *Bad property the fourth — Enhancing the evil effects of undue Pardon.*

1. Throughout the civilized world, pardon is as yet upon an unapt footing: and of this inaptitude, death-punishment is the main cause. Fellow-Citizens! you look for explanation: here it follows.

2. Punishment is everywhere an evil; but everywhere a necessary one: punishment, that is to say, suffering applied purposely by public functionaries. No punishment, no government; no government, no political society.

3. Punishment is everywhere necessary: the application of it is everywhere a necessary part of judicial procedure. But of that same procedure, power of pardon is moreover a *requisite* part; power of pardon, that is to say, as above, power of arresting the hands of the judge, and preventing him from applying punishment, notwithstanding that demand for it, which the conviction of the accused has proved to have place. *Requisite*, I say — not *necessary:* for, without the existence of any such power, government might be anywhere carried on. But in this case, evils of no small magnitude would unavoidably have place — evils which, by apt application of *pardon-power*, may be excluded; and, by such application as is actually made of them, — are, in a degree more or less considerable, everywhere excluded.

4. On the other hand, — evils there are, which are liable to be produced by *pardon-power* where unaptly applied; and, unaptly applied it is, — when applied otherwise than under certain *restrictions*, of which presently. Not inconsiderable will these same evils be seen to be: and, in death-punishment you will see a main cause of them.

5. In what way? you ask. I answer — in this way. Whenever monarchy has place, — a public functionary there is, in whose hands pardon-power has place; and the monarch is that functionary. How the case stands in

this respect under a pure aristocracy, as in Switzerland, — how, in a representative democracy, as in the Anglo-American United States, — I stay not to inquire: to the present purpose any such inquiry would be irrelevant: only that you may see they are not overlooked, is this brief mention made of those cases.

6. You — so long as you have a king — you will have a functionary, in whose hands this same pardon-power will remain lodged. But, having in hand this power, he will have in hand an instrument, with which, if death has place in the list of punishments, it depends upon him, (unless restrained by conditions which will presently be brought to view) — yes, upon him it *does* depend, for the gratification of whatever may at any time be his desires, to produce evil without stint. Take for example murder: applying to *murder* this same power, — it depends upon him — to murder any man, — and as many men, as, at any time or times, it pleases him so to deal with; to apply to that purpose—not his own hands only, but any hand or hands, which, by remuneration, he can engage to lend themselves to this service. In a word, in this same power he possesses an instrument, which (always supposing death to have place on the list of punishments,) is, in the very nature of it, a perennial source of delusion corruption, and misrule, in every imaginable shape.

7. How so? you ask. I answer, thus: Wherever, with a title such as that of *king*, a monarch has place, — so it is that, under the influence of fear and hope, imagination has exalted him into a being of a superior order — a sort of god. In this god upon earth, the people behold the god of their idolatry: — image, deputy, and representative, of the God which is in heaven. As such they worship him, they bow down to him, they kneel to him, they pray to him. Whatsoever it is that he bids them do, that of course they feel disposed to do, repelling as undutiful the consideration of what may be the consequences. To this maleficent exaltation, death-punishment is in a prodigious degree contributory. In the hands of the God of heaven, is the power of life and death: so accordingly is it in the hands of this god upon earth; in *his* hands and no others. The God which is in heaven has his *attributes:* some of them belong to him in severalty; others he holds in joint-tenancy, having for partner this his likeness — the god upon earth. In the import of the word *mercy* is included, the supposition of the existence of a power of producing pain and pleasure — of producing it in cases, in which the production of it is not required by justice; or, on any other score, by the *greatest-happiness* principle. Mercy is of the number of the attributes of the God of heaven: it is of the number of those, in which, by law, he has for partner, this his deputy — the god upon earth.

8. Thus mischievous is this same word *mercy*. In a Penal Code, having for its first principle the greatest-happiness principle, — no such word would have place.

9. Power on the one part is created by obedience on the other part: correspondent, with perfect exactness, is this same power with this same obedience: correspondent and proportionate; neither greater nor less. By whatever hand political power in any shape is holden, a perpetual operation of it is — the pushing the power onwards, in every direction in which the man finds obedience yielding to it, and in every such hand, the abuse of this same power, except in so far as kept down by appropriate checks, — rises in proportion to the quantity of it.

10. Fellow-Citizens! certain restrictions (I have said) there are, without which, by this same power, evils cannot fail to be produced. The restrictions I had thus in view, are these which follow: —

11. i. Restriction the first. — No *pardon* granted, but on condition — that, to the fact of its being granted, and the grounds on which it is grounded, the same *publicity* be given as to the fact, and ground of the *conviction*.

12. Proper grounds for pardon, these: —

I. Multitude of the delinquents. This applies, of course, not to any one separately considered, but to a part of the number: — a part, greater or less, according to the circumstances of the individual case.

II. Since the conviction, discovery made of the convict's *non-guiltiness*.

III. On condition of receipt of the pardon, and not otherwise, *special service* in any shape rendered, or on adequate grounds expected to be rendered, by the convict; such service not being otherwise obtainable on such good terms.

IV. Special service, in the *particular* shape of indication made, — of not less maleficent delinquency on the same occasion, or on any other occasion, on the part of some other individual; or needful evidence afforded, such as is not extractible from the delinquent himself.

V. In case of infliction, apprehension of displeasure at the hands of the *people*.

VI. In case of infliction, apprehension of displeasure at the hands of this or that *foreign power*.

13. What! says somebody, — if the remission has for its ground — apprehension of displeasure at the hands of the people, or at the hand of a foreign power, would any such allegation be compatible with the dignity of the government? would it not be a confession of weakness? I answer — Against this evil, such as it is, the door might be shut without difficulty. Whether it has place or no, depends on the

complexion given to the discourse, which on this occasion is employed: in the case where the people were in question, a tone of sympathy, or say of paternal condescension, would be the tone proper to be assumed: in the case where a foreign power was in question, a tone of civility and general desire of amity.

14. As to the *time* of the *publicity*, both that, and the time of the *pardon*, might and should be left to be appointed by the *power-holder* in question, and left to be determined by circumstances. In many, if not in most, cases of *special service*, what might happen is, that by the publicity the service expected would be prevented from being received.

15. ii. Restriction the second. — As to the relative *time* of the grant of the pardon on the ground of special service — the grant should not be made, unless and until the service had been performed: in other words, it should be made *conditional;* and the condition should be — actual receipt of the expected service: or at any rate, performance of so much as depended upon the individual in question towards the receipt of it. Reason — But for this condition, the ground in question might, where it had no existence, (no such service being so much as expected) be successfully employed as a pretence for pardon, in cases in which pardon was unmeet.

16. iii. Restriction the third. — In the mean time, instead of definitive, the remission might be temporary, or say — in the word commonly employed — a *respite*.

17. iv. Restriction the fourth. — Where, to the *particular ground* of the pardon — namely, the particular service thus performed — publicity is not given at the time of the publicity given to the pardon *itself*, — still, to the *general* ground — *special service expected*, the publicity might be given, and, on the same occasion, an engagement entered into — to give publicity to the *particulars* of the service, so soon as *that* could be done without detriment to the public interest.

18. v. Restriction the fifth. — Lest this engagement should be a pretence, — a list should be kept of all these cases of *publicity delayed:* and, at the recurrence of some certain period — twelve months, for example — publicity should be given to a list of those several engagements: the notice, requisite for explanations and justification, being, in the instance of each delinquent, inserted under appropriate heads.

19. From pardon-power unrestricted, comes impunity to delinquency in all shapes: from impunity to delinquency in all shapes, impunity to maleficence in all shapes: from impunity to maleficence in all shapes, dissolution of government: from dissolution of government, dissolution of political society.

20. All this while, no such sweeping results have place. Whence happens this? Only from the influence of two causes: — 1. One is — on the part of those on whose hands the power of pardon is lodged, non-existence of sinister interest adequate to the production of such result: on the contrary, existence of an interest adequate to the prevention of it. 2. The other is — the preventive tutelary power of public opinion.

21. Still, only in part is it — that, by their united power, these two causes have the effect of warding off this calamitous state of things. As to the *first*, — to no inconsiderable degree, as you will see, the functionaries in whose hands the power of pardoning is lodged, *have* an interest, and that an adequate, and but too effective interest, in the production of the evils in question: as to the *second* — namely, public opinion, — you will see it is itself influenced and determined, by those same men, who are thus under the dominion of that same sinister interest; and that to such a degree, that they are, actually and purposely, instrumental in giving birth to these same evils.

22. Then as to death. That being the case, you will see how it is — that, in the place which death has in the list of punishments, originates so large a portion of that same sinister interest, and at the same time of the power of giving effect to it. This is what you will see immediately, when the cause of the attachment of rulers in general to this mode of punishment, comes to be brought to view: from all which you will see — how important it is that those same *restrictive applications* should accordingly be made.

§ VI. *Causes of the general approval of it.*

1. But (says somebody) — the application so universally made of it — is not this a strong presumptive proof of the need there is of it? Is it not everywhere in use? in use under every form of government? What is more — is it not generally, is it not almost universally, approved? by some a more, by others a less extended application of it? by almost everybody, to some cases, approved, or at any rate to one case — the case of murder — the application of it? Here, then, is not public opinion thus decidedly, and to this degree, in favour of it? Exists there, then, in the whole business of government, a practice, in favour of which a more strongly presumptive proof has place, than that which is seen to plead in favour of *this?* Of the application made of it in practice, the cause (*you* say) may be seen in the interest of *kings* — that sinister interest which you have been holding up to view: — but — public opinion — does not public opinion likewise thus declare in favour of it? and, in the maintenance of this or any other practice in use, on the part of kings or any other rulers, can public opinion have any such, or any other, sinister interest?

I answer — the case is — that, in regard to this practice, public opinion *has* a sinister interest. Public opinion is — in every country,

where civilization and aristocracy have place —the child and disciple of aristocracy; and, in the sinister interest, by which monarchy is wedded to this practice, aristocracy has no small share.

2. Moreover, not only, in one shape, is sinister interest created as above by *power:* but, in another shape also, it is created by *pride;* and, in this case too, aristocracy has its full share. Look now if this be not the case. Whatsoever presents itself as constituting the distinction between the higher and lower orders, the higher orders take a pleasure in the possession of: death-punishment presents itself to them as contributing to this distinction: for, wherever death has place, the lower are sure to stand more exposed to it than the higher orders.

3. Take for instance, *depredation.* In some cases, death-punishment has commonly been applied to this maleficent practice. What are those cases? Those in which it is more particularly the practice of the lower orders: for instance, highway robbery, house robbery, and pocket-picking, in the literal sense of the word: they having in *indigence* an excitement which does not so strongly apply to the higher orders.

4. In other cases, instead of death-punishment, the punishment applied to it is one, which, susceptible as it is of variation upon a scale of indefinite length — such as pecuniary punishments and imprisonment — may be at pleasure reduced to next to nothing. What are these cases? They are those, in which the maleficent forbidden practice is more particularly the practice of the higher orders: for instance, *extortion,* in which case it may be styled the *crime of office* — official situations being those by which are afforded the means necessary to the commission of it.

5. In other cases, again — instead of being punished, it is licensed and established by law. What are these cases? They are those, in which the maleficent practice is exclusively the practice of the higher orders: for instance, where *sinecurism,* pay of useless or needless offices, or overpay of useful and needful offices, is the shape in which it veils itself: *sinecurism* — a mode of obtaining money on false pretences.

6. So much for sinister interest. But, in support of death-punishment, acts, moreover, the never-failing offspring and accompaniment of sinister interest, *interest-begotten prejudice.*

7. Again—those who believe in the Christian religion, believe also in the Jewish religion; and under the Jewish religion, abundant was the application made of death-punishment; and thus may be seen *authority-begotten prejudice* operating in support of it.

8. Lastly, under all governments, from and ever since the earliest times, death-punishment has been in *customary* use: and thus may be seen *primæval prejudice,* and *custom-begotten prejudice,* testifying in favour of it, and operating in support of it. Several causes concurred in bringing it into, and have concurred in keeping it in, use:—1. The strength of the antipathy excited by the acts to which it was applied: 2. The influence which groundless antipathy had in the choice made of punishments in those rude ages, on which the light of the *greatest-happiness principle* had not yet dawned: 3. Personal interest, and aptitude for the purpose of vengeance, in the breasts of rulers: 4. The non-existence as yet of its present succedaneum—prison discipline: 5. The deficiency of prison-room, for want of the quantity of *capital* necessary to the establishment of it. Without need of recurring to its supposed efficiency, sufficient, surely, to account for the universality of death-punishment, is the *sum* of all these causes.

§ VII. *Its Inefficiency and Needlessness proved by experience.*

1. Closed, on this subject, you have been seeing the eyes of rulers, and by what causes, against *reason:* — closed, behold them now, against *experience.*

2. On this subject, the following is the information, for which I find the question indebted, to our fellow-citizen—*M. Lucas:*— In *Tuscany,* in the whole interval between the abolition of death-punishment, in that Grand Duchy, by the Emperor Leopold, while Grand Duke — and the re-establishment of it — the average number of crimes was considerably less than those after that same re-establishment: length of the interval many years: and, in that same interval, *assassinations* no more than *six:* while, in the Roman States, not much larger than Tuscany, the number, in a quarter of a year, was no less than *sixty.*

3. For the first of these so highly instructive and interesting articles of information, we were already indebted to my friend — the illustrious *Howard,* familiarly known by the name of *Prison Howard:* for the other, I know not that we are indebted to anybody but *M. Lucas.*

4. That, by all this put together, the *ruling few* should, in many places, be engaged to abstain willingly from thus dealing with the *subject many,* is little to be hoped for: but, that the *subject many,* although the *ruling few* are not tired of thus dealing with them, — should, sooner or later, be tired of being thus dealt with, — and *that,* to such a degree as to do what depends upon them towards engaging the *ruling few* to cease thus dealing with them, seems not too much to hope for. If so, who can refuse to say — the sooner the oppressed bestir themselves, and the more they bestir themselves, the better?

Whatever may have been the case *antecedently* to this experience — subsequently to the demonstration thus afforded of the needlessness and uselessness of this so highly objectionable mode of punishment, the leaving it unabolished, was everywhere without excuse. Nor could the practice have anywhere remained unabolished, but for the original influence of the above-mentioned causes of error, and in particular, sinister interest, the progenitor of all the others. And therefore it is — that, to account for men's thus shutting their eyes against the light, — the force, by which they appear to have been closed, has thus been presented to your view.

*** While these pages are under revision, comes in the London newspaper, the Spectator. A masterly article, on this subject, presenting itself as operating powerfully in support of the policy here recommended, — it is here subjoined. The No. is 182, for the week ending Saturday, May 28, 1831.

CAPITAL PUNISHMENTS.

Two men were hanged on Wednesday; one for sheep-stealing, the other for stealing in a dwelling-house. It was alleged, in aggravation of the crime of the former, that his character was bad, — he was what the French call a *mauvais sujet;* it does not appear that he had ever been tried before: the thefts of the latter had been numerous and extensive. The execution of these men for crimes unaccompanied by the slightest violence, has very naturally attracted the notice of a large and respectable class of the community, to whom the sanguinary character of our code has long been a subject of regret. It indeed appears singular, on a first view of the subject, that in free England, as it is usually called, the number of crimes punishable with death should be greater than in any other European state — that we who boast so highly of our civilization should display in our practice greater barbarism than the least enlightened of our neighbours. On a closer inspection of the case, however, the wonder will vanish. Our race of real freedom is only beginning; hitherto there has been freedom for a party — licence for a faction, but the great mass of the people have been in bondage. In purely despotic countries, the king can afford to be just. Josepn the Second abolished the punishment of death throughout his dominions. Even now it is inflicted there only for murder and treason. The emperor has his Lichtensteins and his Esterhazys, as we have our Northumberlands and our Newcastles; but Austria has no Sarums nor Gattons — the curse of the rotten boroughs has not visited her. In states, again, where freedom is a living substance as well as a form, the government can show mercy. America has almost no capital punishments: America has neither boroughs nor boroughmongers. In England, "law grinds the poor." And why? The remainder of the line supplies the ready answer — "rich men make the law!" Here is the secret of our bloody code — of the perverse ingenuity by which its abominations have so long been defended — of the dogged obstinacy with which all attempts to wash them away has been withstood. "Whoso stealeth a sheep, let him die the death," says the statute: could so monstrous a law have been enacted, had our legislators been chosen by the people of England? But our lawmakers hitherto have been our landlords. By the sale of his sheep, the farmer pays his rent; by the rent of the farmer, the luxury of the Member is upheld; touch one link, touch all. The price of blood, some six hundred years ago, was equal to forty pounds of our degenerate coin. In process of time, silver fell in the market, and with it the life of an Englishman, twenty-fold. Sir Robert Peel, moderate in all things, raised the sum from £2 to £5. Why not to £500 — why not to £5000? In point of moral guilt, is not he who filches a shilling as criminal as he that filches a million? If we hang for *example*, the lesser crime is of necessity the more frequent, and most calls for repression. Besides, it is the poor — they who most require protective laws, that are the sufferers by petty plunder. There's the rub. "Rich men make the law." Rich men alone suffer by the abstraction of large sums — hence the bloody penalty. But the remedy is nigh at hand — it is even now come. The bill, which gives us good legislators, insures for us good laws. Men impartially chosen will judge impartially. We shall no more have one rule for the rich and another for the poor; nor shall we any longer have the pain of listening to the defence, in the high Court of Parliament, of absurdities which have long been condemned by sensible men in every other place in the empire. Reform will satisfy the yearnings of humanity as amply as the hopes of patriotism.

PART III.

OF INDIRECT MEANS OF PREVENTING CRIMES.

INTRODUCTION.

In all sciences, there are some branches which have been cultivated more slowly than others, because they have required a longer train of observations, and more profound reflection. Thus, in mathematics, one part is called transcendental, or sublime, because, so to speak, it is a new science, beyond the ordinary science.

The same distinction might, at a certain point, be applied to legislation. Some actions are hurtful: what ought to be done to prevent them? The first reply which presents itself to all the world is — *Prohibit such actions; punish them.* This method of combating offences is the most simple, and the first adopted; and every other method of attaining the same end is a refinement in art, and, so to speak, its transcendental part.

This part consists in providing a train of legislative proceedings for the prevention of offences, by acting principally upon the inclinations of individuals, for the purpose of diverting them from evil, and impressing on them the direction most useful to themselves and others.

The first method of combating offences, by *punishments*, constitutes *direct* legislation.

The second method of combating them, *by means which prevent them*, constitutes what may be called the *indirect* branch of legislation.

Thus the sovereign acts *directly* against offences, when he prohibits each one separately, under pain of special punishment: he acts indirectly, when he takes precautions to prevent them.

In direct legislation, the evil is attacked in front: in indirect legislation, it is attacked by oblique methods. In the first case, the legislator declares open war with the enemy: he hoists his signals, he pursues, he fights hand to hand with him, and mounts his batteries in his presence, in open day. In the second case, he does not announce his designs: he opens his mines, he consults his spies; he seeks to prevent hostile designs, and to keep in alliance with himself those who might have secret intentions hostile to him.

Political speculators have perceived all this; but in speaking of this second branch of legislation, they have not clearly expressed their ideas: the former has long since been reduced to system; the second has never been analyzed: no one has thought of treating it methodically, of classifying it, — in a word, of considering it as a whole. It is still a new subject.

Writers who have formed political romances tolerate direct legislation: it is the last resource to which they apply, and of which they never speak with a very lively interest. On the contrary, when they speak of the means of preventing offences — of rendering men better — of improving their manners — their imagination kindles, their hopes brighten, they believe that they are about to effect a great work, and that the condition of the human race is about to receive a new form. This arises from the habit of thinking every thing magnificent in proportion as it is unknown, and because upon such vague subjects the imagination has greater scope than upon those which have long been submitted to the yoke of analysis. *Major e longinquo reverentiâ.* This saying is equally applicable to thoughts and persons. A detailed examination will reduce all these undefined hopes to their just dimensions of what is possible; but if we lose some fictitious treasures, we shall be well indemnified by ascertaining the real extent of our resources.

In order clearly to ascertain what belongs to these two branches, it is necessary to begin by forming a just idea of direct legislation.

We should proceed in the following manner: —

1. To determine what acts ought to be considered as crimes.

2. To describe each crime: as murder, theft, peculation, &c.

3. To exhibit the reasons for attributing to these acts the quality of crimes — reasons which ought to be deduced from a single principle, and consequently which should agree among themselves.

4. To set apart a sufficient punishment for each crime.

5. To exhibit the reasons which serve to justify this punishment.

This penal system, if it were the best possible, would be defective in many respects:

1. It would require that the evil had existed, before the remedy could be applied. The remedy consists in the application of punishment; and punishment can only be inflicted after the crime is committed. Each fresh instance of the infliction of punishment is another proof of its inefficiency, and allows a certain degree of danger and alarm to subsist.

2. The punishment itself is an evil, al-

though necessary for the prevention of a greater evil. Penal justice, throughout the whole course of its operation, can only be a train of evils—evils in the threats and constraint of the law—evils in the pursuit of the accused, before the innocent can be distinguished from the guilty—evils in the infliction of judicial sentences—evils in the inevitable consequences which reverberate upon the innocent.

3. In short, the penal system has not sufficient hold upon many mischievous acts which escape from justice—sometimes from their frequency, sometimes from the facility with which they are concealed—sometimes from the difficulty of defining them—sometimes from a wrong direction in public opinion, which screens them. Penal law can only act within certain limits, and its power only extends to palpable acts, susceptible of manifest proofs.

This imperfection of the penal system has induced a search after new expedients for supplying what is wanting. These expedients have for their object the prevention of crimes,—sometimes by taking away even the *knowledge* of evil—sometimes by taking away the *power* or the *will* to do evil.

The most numerous class of these means is connected with the art of directing the inclinations, by weakening the seductive motives which excite to evil, and by fortifying the tutelary motives which excite to good.

Indirect methods, then, are those which, without having the characters of punishment, act either physically or morally upon the man, in order to dispose him to obey the laws—to remove from him temptations to crimes, and govern him by his inclinations and his knowledge.

These indirect methods have not only great advantage in point of gentleness; they also often succeed when direct methods fail. All modern historians have remarked how much the abuses of the Roman Catholic Church have been diminished since the establishment of Protestantism. What popes and councils could not effect by their decrees, a happy rivalry has effected without trouble: they have feared to give occasion of scandal, which should become a subject for triumph to their enemies. Hence, this indirect method, the free competition of religions, has had greater force in restraining and reforming them, than all their positive laws.

We may take another example from political economy. It has been considered desirable that the prices of merchandise, and especially that the interest of money, should be low. High prices, it is true, are only an evil, by comparison with the good of which they hinder the enjoyment; but such as it is, there has been a reason for seeking to diminish them. In what manner has it been attempted? a multitude of regulations have been established—a fixed rate—a legal interest; and what has happened? The regulations have been eluded—punishments have been increased—and the evil, instead of being diminished, has increased also. There is no efficacy but in an *indirect* method, of which few governments have had the wisdom to make use. To leave a free course for the competition of all merchants, of all capitalists—to trust, instead of making war upon them—to allow them to supplant each other—to invite the buyers to themselves by the most advantageous offers:—such is the method. Free competition is equivalent to a reward granted to those who furnish the best goods at the lowest price. It offers an immediate and natural reward, which a crowd of rivals flatter themselves that they shall obtain, and acts with greater efficacy than a distant punishment, from which each one may hope to escape.

Before entering upon an exhibition of these indirect methods, I ought to acknowledge that the manner of their classification is a little arbitrary, so that several might be ranged under different heads. In order invariably to distinguish them from each other, an exceedingly subtle and fatiguing metaphysical analysis would be required. It is sufficient for the object in view, if all the indirect methods may be placed under one or other of these heads, and if the attention of the legislator be awakened to the principal sources from which they may be drawn.

I only add one preliminary remark, but it is an essential one. In the variety of measures about to be exhibited, there is not one that can be recommended as suitable to each government in particular, and still less to all in general. The special advantage of each measure, considered by itself, will be indicated under its title, but each may have relative inconveniences, which it is impossible to determine, without a knowledge of particular circumstances. It ought, therefore, to be well understood, that the object in view is, not to propose the adoption of any given measure, but solely to exhibit it to the view, and recommend it to the attention, of those who may be able to judge of its fitness.

CHAPTER I.

METHODS OF TAKING AWAY THE PHYSICAL POWER OF INJURING.

WHEN the will, the knowledge, and the power, necessary for an act concur, this act is necessarily produced. *Inclination, knowledge, power;* these, then, are the three points to which the influence of the laws may be applied, in order to determine the conduct of individuals. These three words contain in abstract the sum and the substance of every

thing which can be done by direct or indirect legislation.

I begin with power, because the means of influence in this respect are more limited and more simple, and because, in those cases in which the power to injure is taken away, every thing is done — success is secure.

Power may be distinguished into two kinds: 1. *Internal* power, which depends upon the intrinsic faculties of the individual: 2. *External* power, which depends upon the persons and things which are without him, and without which he cannot act.*

As to *internal* power, which depends upon the faculties of the individual, it is scarcely possible to deprive a man of this advantage: the power of doing evil is inseparable from the power of doing good. When the hands are cut off, a man can hardly steal; but also he can hardly work.

Besides, these privative means are so severe, that they can only be employed with regard to criminals already convicted. Imprisonment is the only one which can be justified in certain cases, in order to prevent an apprehended offence.†

There are some cases in which the power of injuring may be taken away, by excluding what Tacitus calls *irritamenta malorum* — the subjects, the instruments of the offence. Here the policy of the legislator may be compared to that of a governess: the bars of iron for the windows, the guards around the fire, care in removing all sharp and dangerous instruments out of the reach of the children, are steps of the same kind; with the prohibition of the sale and fabrication of dies for coining, of poisonous drugs, of concealed arms, of dice, and other instruments of prohibited games; the prohibition of making and having snares or other means of catching game.

Mahomet, not trusting to reason, has sought to put it out of the power of men to misuse strong liquors. If we regard the climate of hot countries, in which wine produces fury rather than stupidity, it will perhaps be found that its total prohibition is more gentle than its permitted use, which would have produced numerous offences, and consequently numerous punishments.

Taxes upon spirituous liquors, in part, accomplish the same end. In proportion as the price is raised above the reach of the most numerous class, the means of yielding to intemperance are taken from them.

Sumptuary laws, so far as they prohibit the introduction of certain articles which are the objects of the legislator's jealousy, may be referred to this head. It is this which has rendered the legislation of Sparta so famous: the precious metals were banished; strangers were excluded; voyages were not permitted.

At Geneva, the wearing of diamonds was prohibited, and the number of horses was limited.‡

Under this head may be mentioned many English statutes relative to the sale of spirituous liquors: their open exposure to sale is prohibited; it is necessary to obtain a licence which costs much, &c. The prohibition to open certain places of amusement on the Sunday belongs to this head.

To the same head must be referred measures for the destruction of libels, seditious writings, and obscene figures exhibited in the streets, and for preventing their printing and publication.

The old police of Paris prohibited servants from carrying not only swords, but also canes and sticks. This might have been a simple distinction of rank — it might have been as a means of security.

When one class of the people is oppressed by the sovereign, prudence would direct that they should be forbidden to bear arms. The greater injury becomes a justifying reason for the commission of the lesser.

The Philistines obliged the Jews to resort to them, whenever they wanted to sharpen their hatchets and saws. In China, the manufacture and sale of arms is confined to the Chinese Tartars.

By a statute of George the Third, any individual is forbidden to have more than fifty pounds weight of gunpowder in his house; and the dealers in gunpowder are forbidden to have more than two hundred pounds weight at one time. The reason assigned is the danger of explosions.

In the statutes relating to the public roads and turnpikes, the number of horses to be used in a carriage is limited to eight; except in case of the removal of certain articles, and in what relates to the public service connected with the artillery and ammunition.

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* 1. Power *ab intra*. 2. Power *ab extra*.

† Muto linguam. De virginibus puerisque, sed non virginibus puerisve sermo est: et præterea alienus sermo non erubescit. Dixi adversus potestatem peccandi, quam *ab intra* nominavi, nullum dari remedium. En vero exceptionem *circumcisio*. Dicitur non apud Judæos solos fuisse in usu. Quænam igitur instituti ratio? Anne adversus venerem solitariam? Ita visum est, nescio cui: credo equidem Voltario. Ingeniosum sane fuisset excogitamentum: siquidem hoc modo, ut videtur, proclivitas saltem minuitur si non facultas tollitur. Adversus debilitatem remedium, sterilesque nuptias. Vitium magis perniciosum quam quæ multò sunt odiosiora: siquidem magis debilitat, et homo sibi semper præsens. Quidni huc pertineat Judeæ gentis spectata fæcunditas! sed nec vitium videtur nec remedium rude ævum sapere: faciliusque crediderim hodiernos attribuisse quam antiquos invenisse.

‡ These customs are not cited as models, but only to show under what class of laws they should be ranged.

The reason assigned is the preservation of the roads.

If these measures, and others like them, have, besides, a political object, it is what I do not pretend to say; but it is certain, that such expedients may be employed for taking away the means of revolt, or diminishing the facilities for smuggling.

Among the expedients which may be derived from this source, I know of none more happy nor more simple than that which is employed in England for rendering the stealing of bank-notes difficult, when it is intended to send them by the post: they may be cut into two parts, and each part sent separately. The stealing of one half of the note would be useless, and the difficulty of stealing both parts, the one after the other, is so great, that the offence is almost impossible.

For the exercise of some professions, proofs of capacity are required. There are others which the laws render incompatible with each other. In England, many offices of justice are incompatible with the condition of an attorney: it is feared lest the right hand should secretly work for the benefit of the left.*

Contractors for the supply of provisions, &c. for the navy, are not allowed to sit in Parliament. The contractors may become delinquents, and subject to the judgment of the Parliament: it would not be proper that they should be members of it. But there are stronger reasons for this exclusion, to be drawn from the danger of increasing ministerial influence.

CHAPTER II.

ANOTHER INDIRECT METHOD — HINDER THE ACQUISITION OF KNOWLEDGE WHICH MAY BE RENDERED INJURIOUS.†

I ONLY mention this policy to proscribe it: it has produced the censorship of books; it has produced the inquisition; it would produce the eternal degradation of the human race.

I intend to show—1*st*, That the diffusion of knowledge is not hurtful upon the whole; crimes of refinement being less hurtful than those of ignorance: 2*d*, That the most advantageous method of combating the evil which may result from a certain degree of knowledge, is to increase its quantity.

I say at once, that the diffusion of knowledge is not hurtful upon the whole. Some writers have thought, or appeared to think, that the less men knew, the better they would be; that the less they knew, the fewer objects would they be acquainted with, as motives to, or instruments for doing evil. That fanatics have held this opinion, would not be surprising, seeing there is a natural and constant rivalry between the knowledge of useful and intelligible things, and the knowledge of things imaginary, useless, and unintelligible. But this style of thinking, with respect to the danger of knowledge, is sufficiently common among the mass of mankind. They speak with regret of the golden age — of the age when nothing was known. In order to exhibit the mistake upon which this manner of thinking is founded, a more precise method of estimating the evil of an offence, than has hitherto been employed, is required.

That the crimes of refinement have been considered more hateful than the crimes of ignorance, is not surprising. In judging of the grandeur of offences, the principle of antipathy has been more followed than the principle of utility: antipathy looks more at the apparent degradation of character indicated by the offence, than at any other circumstance. This, in the eyes of passion, is the *salient point* in every action; in comparison with which, the strict examination required by the principle of utility will always appear cold. Now, the greater the knowledge and refinement indicated by a crime, the greater the reflection exhibited on the part of its author, the greater the depravation of moral dispositions indicated also: but the evil of a crime, the only object, according to the principle of utility, is not solely determined by the depravity of character exhibited — it depends immediately upon the sufferings of the persons who are affected by the crime, and the alarm which results from it to society in general; and into this sum of evil, the depravity which the criminal has manifested, enters as an aggravation, but not as an essential circumstance.

The greatest crimes are those for which the slightest degree of knowledge is sufficient; the most ignorant individual always knows how to commit them.

Inundation is a greater crime than incendiarism, incendiarism greater than murder, murder than robbery, robbery than cheating. This might be demonstrated by an arithmetical process, by an inventory of the items of evil on both sides, by a comparison of the extent of evil done to each person injured, and by the number of persons who would be

* In Austria, a flayer is not allowed to sell meat, it being presumed that if the animal had been wholesome, it would not have come to his hands. *Sonenfel's* Police of Vienna, 1777. A great number of police regulations may be referred to this head.

† Knowledge, though commonly considered as distinct from power, is really a branch of it. It is a branch of power, whose seat is in the mind. Before a man can perform any act, he must know two things: the motives for doing it, and the means of doing it. These two kinds of knowledge may be distinguished into that of motives, and that of means: the first constitutes inclination, the second constitutes a part of power.

enveloped in such evil. But how much knowledge must be possessed, that an individual may be qualified to commit such acts? The most atrocious of all only requires a degree of information which is found among the most barbarous and savage of men.

Rape is worse than seduction or adultery; but rape is more frequent in times of ignorance; seduction and adultery in times of civilization.

The dissemination of knowledge has not augmented the number of crimes, nor even the facility of committing them: it has only diversified the means of their accomplishment. And how has it diversified them? by gradually substituting those which are less hurtful.

Is a new method of cheating invented? the inventor profits for a time by his discovery; but soon his secret is discovered, and we are upon our guard. He must then have recourse to a new method, which, like the first, will last only for a time, and pass away. All this time it is only cheating, which is less mischievous than theft, which itself is a less evil than highway robbery.* For what reason? The confidence of every one in his own prudence, in his own sagacity, hinders him from being alarmed so much by a case of cheating as by a robbery.

Let us, however, acknowledge that the wicked abuse every thing, — that the more they know, the greater will be their means of doing evil: what follows?

If the good and the wicked compose two distinct races, as those of the blacks and the whites, the one might be enlightened whilst the other was held in ignorance. But since it is impossible to distinguish them, and since good and evil are so frequently mingled in the same individuals, one law must be established for all: general illumination or general blindness; there is no medium.

The remedy springs out of the evil itself. Knowledge confers no advantage upon the wicked, except they exclusively possess it: a snare, when recognised, is no longer a snare. The most ignorant nations have known how to poison the points of their arrows; but it is only those nations which are far advanced in civilization, which are acquainted with all poisons, and can oppose antidotes to each.

All men are qualified to commit crimes: it is only the enlightened who are qualified to frame laws for their prevention. The less instructed a man is, the more is he led to separate his interests from those of his fellows. The more enlightened he is, the more distinctly will he perceive the union of his personal with the general interest.

Examine the history of past times: the most barbarous ages will present an assemblage of all crimes, and even crimes of cheating, as well as those of violence. The grossness given to some vices does not exclude a single one. At what period were false titles and false dotations most multiplied? When the clergy alone knew how to read—when, from the superiority of their knowledge, they regarded other men nearly as we regard horses, which we could no longer render submissive to the bit and the bridle, if their intellectual faculties were augmented. Why, at the same time, had they recourse to judicial duels, to proofs by fire and water, to all those species of trials which they called *judgments of God*? It was because, in the infancy of reason, they had no principles upon which to discern between true and false testimony.

Compare the effects produced under those governments which have restrained the publication of thought, and those which have allowed it a free course. You have, on the one side, Spain, Portugal, Italy; you have, on the other side, England, Holland, and Northern America. Where are the most civilized manners and the greatest happiness? where are the most crimes committed? where is society most gentle and most secure?

Those institutions have been too much celebrated, in which their heads have monopolized all knowledge. Of this kind was the priesthood of ancient Egypt, the caste of the Bramins in Indostan, the societies of the Jesuits in Paraguay. Upon these institutions it is proper to make two observations: the first, that if their conduct have merited eulogium, it is with respect to the interest of those who have invented these forms of government, not with respect to the interest of those who have been subject to them. It may be admitted that the people have been tranquil and docile under these theocracies: have they been happy? This cannot be believed, if it be admitted that abject servitude, vain terrors, useless obligations and mortifications, painful privations and gloomy opinions, are obstacles to happiness.

The second observation is, that they have less completely obtained their design in maintaining natural ignorance than in spreading prejudices and propagating errors. The chiefs themselves have always finished by becoming the victims of this narrow and pusillanimous policy. Nations which have been retained in a state of constant inferiority by institutions

* I always suppose that the damage of the crime is the same: for, in one point of view, cheating may prove worse; since a greater sum may be obtained by fraud than by highway robbery. For proof of the superiority of modern manners over those of ancient times, reference may be made to Hunter's Essay on Population: for proof of their superiority over the Gothic ages, to Voltaire's General History, Robertson's Introduction to Charles V., Barrington's Observations on the English Statutes, and the Treatise of Le Chevalier de Chastelleux on Public Happiness—a work well designed, but indifferently executed.

which were opposed to all kinds of progress, have at length become the prey of other nations, who have obtained a comparative superiority. These nations, become old in their infancy, under tutors who prolonged their imbecility in order more easily to govern them, have always offered an easy conquest, and, once subjugated, have known no change but in the colour of their chains.

But it may be said, there is no question among us of leading men back to ignorance: all governments feel the necessity of illumination. What excites their fears, is the liberty of the press. They are not opposed to the publication of books of science; but have they not reason to oppose the publication of immoral and seditious writings, with regard to which there is no longer any opportunity of preventing their mischief, when once they are issued? To punish a guilty author may *perhaps* prevent the guilt of those who may be tempted to imitate him; but to prevent, by the institution of a censorship, the publication of evil books, is to stop the poison at its source.

The liberty of the press has its inconveniences, but the evil which may result from it is not to be compared with the evil of the censorship.

Where shall that rare genius, that superior intelligence, that mortal accessible to all truth and inaccessible to all passions, be found, to whom to confide this right of supreme dictation over all the productions of the human mind? Would a Locke, or a Leibnitz, or a Newton, have had the presumption to undertake it? And what is this power that you are obliged to confide to ordinary men? It is a power which, by a singular necessity, collects together in its exercise all the causes of prevarication, and all the characters of iniquity. Who is the censor? He is an interested judge — a sole, an arbitrary judge, who carries on a clandestine process, condemns without hearing, and decides without appeal. Secresy, the greatest of all its abuses, is essential to a censorship: publicly to plead the cause of any book would be to publish it, in order to determine whether it were fit for publication.

Whilst as to the evil which may result from it, it is impossible to estimate it, since it is impossible to say what it arrests. It is nothing less than the danger of arresting the progress of the human mind in every career. Every interesting and new truth must have many enemies, because it is interesting and new. Is it to be presumed that the censor will belong to that infinitely small number who rise above established prejudices? were he to possess this elevation of mind, would he possess boldness sufficient to compromise himself by discoveries of which he would not possess the glory? There is only one course of safety for him: it is to proscribe all but ordinary ideas — to pass his blasting scythe over every thing which rises above the ordinary level. He risks nothing by prohibition; he risks every thing by permission: by doubt he does not suffer; it is truth which is stifled.

If it had depended upon men invested with authority to regulate the progress of the human mind, where should we now have been? Religion, legislation, natural philosophy, morals, would still be all in darkness.

The proof of these well-known facts need not here be repeated.

The true censorship is that of an enlightened public, which will brand dangerous and false opinions, and will encourage useful discoveries. The boldness of a libel in a free country will not save it from general contempt; but, by a contradiction easily to be explained, the indulgence of the public in this respect is proportioned always to the rigour of the government.

CHAPTER III.

OF INDIRECT MEANS OF PREVENTING THE WILL TO COMMIT OFFENCES.

WE have seen that legislation can only operate by influencing the power, the knowledge, the will: we have spoken of the indirect means of taking away the power of injury: we have seen that the policy which would prevent men from acquiring information would be more hurtful than advantageous. All other indirect means which can be employed must therefore have reference to the direction of their inclinations; to the putting in practice the rules of a logic too little understood at present — *the logic of the will* — a logic which often appears in opposition to the logic of *understanding*, as it has been well expressed by the poet —

> "Video meliora,
> Proboque, et deteriora sequor."

The methods we are about to present are of a nature to make this internal discord in many cases to cease; to diminish this contrariety among motives, which often exists only from the unskilfulness of the legislator — from an opposition which he has himself created between the natural and political sanctions — between the moral and religious sanctions. If he could make all these powers concur towards the same end, all the faculties of the man would be in harmony, and the inclination to injure would no longer exist. In those cases in which this object cannot be attained, it is proper that the power of the tutelary motives should be made to exceed that of the seductive motives.

I shall propose the indirect methods by which the will may be influenced in the form

of political or moral problems, and I shall show their solution by different examples:—

Problem 1*st*, To divert the course of dangerous desires, and direct the inclination towards those amusements which are most conformed to the public interest.

2*d*, To make such arrangements, that a given desire may be satisfied without prejudice, or with the least possible prejudice.

3*d*, To avoid furnishing encouragements to crimes.

4*th*, To augment the responsibility of individuals, in proportion as they are more exposed to temptation.

5*th*, To diminish their sensibility with regard to temptation.

6*th*, To strengthen the impression of punishments upon the imagination.

7*th*, To facilitate the knowledge of the commission of crimes.

8*th*, To prevent crimes, by giving to many persons an immediate interest in preventing them.

9*th*, To facilitate the means of recognising and finding individuals.

10*th*, To increase the difficulty of escape to delinquents.

11*th*, To diminish the uncertainty of procedure and punishments.

12*th*, To prohibit accessory offences, in order to prevent their principals.

After these means, whose object is special, we shall point out others of a more general nature, such as the cultivation of benevolence and honour, the employment of the motive of religion, and the use which may be made of the power of instruction and education.

CHAPTER IV.

PROBLEM I.

To divert the course of Dangerous Desires, and direct the inclination towards those amusements which are most conformed to the public interest.

THE object of direct legislation is to combat pernicious desires, by prohibitions and punishments directed against the hurtful acts to which those desires may give birth. The object of indirect legislation is to countermine their influence, by augmenting the force of the less dangerous desires which may enter into competition with them.

There are two objects to be considered:—What are the desires which it would be desirable to weaken? By what means may we attain this end?

Pernicious desires may arise from three sources:—1*st*, The malevolent passions; 2*d*, The fondness for inebriating liquors; 3*d*, The love of idleness.

The methods of diminishing them may be reduced to three heads:—1. The encouraging kindly feelings; 2. The favouring the consumption of non-inebriating liquors, in preference to those which intoxicate; 3. The avoidance of forcing men into a state of idleness.

Some persons may be astonished that the catalogue of the sources of vicious inclinations is so limited; but they must be made to observe, that in the human heart there is no passion absolutely bad: there is no one which does not need direction — there is no one which ought to be destroyed. It is said, that when the angel Gabriel prepared the prophet Mahomet for his mission, he took out of his heart a black spot which contained the seed of evil. Unhappily this operation is not practicable in the hearts of ordinary men. The seeds of good and evil are inseparately mixed: inclinations are governed by motives. But motives are constituted by pains and pleasures; by all pains to be avoided, by all pleasures to be pursued. Hence all these motives may produce all sorts of effects, from the best to the worst.

They are trees, which bear excellent fruits, or poisons, according to the aspect in which they are found, according to the culture of the gardener, and even according to the wind which prevails, and the temperature of the day. The most pure benevolence, too confined in its object, or mistaking its means, will be productive of crimes: selfish affections, though they may occasionally become hurtful, are constantly most necessary; and notwithstanding their deformity, the malevolent passions are always at least useful — as means of defence, as securities against the invasions of personal interest. No one affection of the human heart ought therefore to be eradicated, since there is not one which does not act its part in the system of utility. All that is required, is to work upon these inclinations according to the direction which they take, and the effects which can be foreseen. It may be possible also to establish a useful balance among them, by fortifying those which are usually weak, and weakening those which are too strong. It is thus that a farmer directs the course of the waters, that he may not impoverish his meadows, and prevents their inundation by dykes. The art of constructing dykes consists in not directly opposing the violence of the current, which would carry away every obstacle placed directly in its front.

The desire for intoxicating liquors is, properly speaking, the only one which can be extirpated without producing any evil, since the irascible passions, as I have said, are a necessary stimulant in the cases in which individuals have to protect themselves from injuries, and to repel the attacks of their enemies. The love of repose is not hurtful in itself; indolence is, however, an evil, inasmuch as it

favours the ascendancy of evil passions. At all times, these three desires may be considered as requiring to be equally resisted. It need scarcely be dreaded, lest we should be too successful in overcoming the inclination to idleness, or that it will be possible to reduce the vindictive passions below the point of their utility.

The first expedient, I have said, consists *in encouraging innocent amusements.* This is one branch of the very complicated but undefined science which consists in advancing civilization. The state of barbarism differs from that of civilization by two characteristics: — 1. By the force of the *irascible* appetites; 2. By the small number of objects of enjoyment which offer themselves to the *concupiscible* appetites.*

The occupations of a savage, when he has procured the necessaries for his physical wants — the only wants he knows — are soon described: the pursuit of vengeance — the pleasures of intoxication, if he possess the means — sleep, or the most complete indolence: these are all his resources. Each of his inclinations is favourable to the developement and action of every other: resentment finds easy access to an empty mind; idleness is the door of drunkenness, and drunkenness produces quarrels which nourish and multiply quarrels. The pleasures of love not being complicated by the sentimental refinements which embellish and strengthen them, do not occupy a conspicuous part in the life of the savage, and do not go far in filling up the intervals of his labours.

Under a regular government, the necessity of revenge is suppressed by legal protection, and the pleasure of giving way to it is repressed by fear of punishment. The power of indolence is weakened, but the love of intoxicating liquors is not diminished. A nation of savages, and a nation of hunters, are convertible terms. The life of a hunter offers long intervals of leisure, as well as that of a fisherman, provided they understand the means of preserving the species of food which they obtain. But in a civilized state, the mass of the community is composed of labourers and artisans, who have no more leisure than is required for relaxation and sleep. The misfortune is, that the passion for strong drinks may be gratified in the midst of a life of labour, and they may be taken during the hours set apart for repose. Poverty restrains it among the inferior classes; but artisans, whose labour is better paid for, may make great sacrifices to this fatal desire; and the richer classes may devote to it all their time. Hence we see that, in the rude ages, the superior classes have divided their life between war — the chase, which is the image of war — the animal functions, and long repasts, of which drunkenness was the chief attraction. The detail of such scenes formed the whole history of a great proprietor, of a grand feudal Baron, in the Gothic ages. The privilege of this noble warrior, of this noble hunter, seems to have been to prolong, in a more civilized society, the occupations and the character of the savage.

This being the case, every innocent amusement that the human heart can invent is useful under a double point of view: — 1*st*, For the pleasure itself, which results from it; 2*d*, From its tendency to weaken the dangerous inclinations which man derives from his nature. And when I speak of innocent amusements, I mean all those which cannot be shown to be hurtful. Their introduction being favourable to the happiness of society, it is the duty of the legislator to encourage them, or, at least, not to oppose any obstacle to them. I shall mention the sources of some, commencing with those which are regarded as most gross, and proceeding to those which are considered as more refined: —

1. The introduction of a variety of aliments, and the improvement of horticulture applied to the production of nutritive vegetables.

2. The introduction of non-intoxicating liquors, of which coffee and tea are the principal. These two articles, which some superficial minds would be surprised to find occupying a place in a catalogue of moral objects, are so much the more useful, since they come in direct competition with intoxicating liquors.†

3. The improvement of every thing which constitutes elegance, whether of dress or furniture, the embellishment of gardens, &c.

4. The invention of games for passing the time, whether athletic or sedentary, among which the game of chess holds a distinguished rank: I exclude only games of chance. These tranquil games have brought the sexes more nearly upon an equality, and have diminished ennui, the peculiar malady of the human race, and especially of the opulent and the aged.

5. The cultivation of music.

6. Theatres, assemblies, and public amusements.‡

* This distinction of the schoolmen is sufficiently complete: to the first class belong the pleasures of malevolence; to the second, all other pleasures.

† The celebrated Hogarth painted two pictures, called Beer Street and Gin Street. In the first, every thing breathes an air of gaiety and health; in the second, of misery and disease. This admirable artist wished to instruct by his pencil, and had reflected more upon morals than many who give themselves out as professors of this science.

‡ "I have heard M. d'Argenson say, that when he was lieutenant of police, there were more irregularities and debaucheries committed in Paris during the Easter fortnight, when the theatres were shut, than during the four months.

7. The cultivation of the arts, sciences, and literature.

When we consider these different sources of enjoyment, as opposed to the necessary means of providing subsistence, they are called objects of luxury: if their tendency be such as has been suggested, how singular soever it may appear, luxury is rather a source of virtue than of vice.

This branch of policy has not been entirely neglected, but it has been cultivated in a political, rather than in a moral view. The object has rather been, to render the people tranquil and submissive to government, than to render the citizens more united among themselves, more happy, more industrious, more honest.

The games of the circus were one of the principal objects of attention among the Romans. It was not merely a method of conciliating the affections of the people, but also of diverting their attention from public affairs. The saying of Pylades to Augustus is well known.

Cromwell, whose ascetic principles did not allow him to use this resource, had no other means of occupying the minds of his countrymen, than engaging the nation in foreign wars.

At Venice, a government jealous to excess of its authority, showed the greatest indulgence to pleasures.

The processions and other religious festivals of Catholic countries partly accomplished the same object as the games of the circus.

All these institutions have been considered by political writers as so many means of softening the yoke of power — of turning the minds of men towards agreeable objects, and preventing them from occupying themselves with the affairs of government. This effect, without having been the object of their establishment, has caused them to obtain more favour when they have been established.

Peter I. had recourse to a greater and more generous policy.

The manners of the Russians, with the exception of sobriety, were more Asiatic than European. Peter I., desirous of moderating their grossness, and softening the ferocity of their manners, employed some expedients which were perhaps a little too direct. He employed every possible encouragement, and went so far as to use violence, in order to introduce the European dress, the amusements, the assemblies, the arts, of Europeans. To lead his subjects to the imitation of the other nations of Europe, was, in other terms, to civilize them. But he found the greatest resistance to all these innovations. Envy, jealousy, contempt, and a multitude of anti-social passions, rendered them disinclined to an assimilation to these rival strangers. These passions no longer recognised their object when the visible marks of distinction were effaced. By taking away that exterior which distinguished them, he took away from them, so to speak, the pretext and aliment of these hateful rivalries. He associated them with the great republic of Europe, and he gained every thing for them by this association.

The rigid compulsory observance of the Sabbath, as in Scotland, in some parts of Germany, and in England, is a violation of this policy, which has no foundation in the Gospels, and is even contrary to many texts and positive examples.

Happy the people who, rising above brutal and gross vices, study elegance of manners, the pleasures of society, the embellishments of their places of resort, the fine arts, the sciences, public amusements, and exercises of mind. The religions which inspire sadness — the governments which render men mistrustful, and separate them one from another, contain the germs of the greatest vices and of the most hurtful passions.

of the season during which they were open."— *Memoirs de Pollnitz*, tom. iii.

CHAPTER V.

PROBLEM II.

To make such arrangements, that a given Desire may be satisfied without prejudice, or with the least possible prejudice.

THE desires of which we are about to speak, as well as others which we have not mentioned, may be satisfied in different manners, and on different conditions, through all the degrees of the scale of morality, from innocence to the highest crime. That these desires may be satisfied without prejudice — such is the first object to be accomplished; but if they cannot be regulated to this point, that their satisfaction may not produce so great an injury to the community as that which results from a violated law — such is the second object. If even this cannot be attained, to arrange every thing in such manner, that the individual, placed by his desires between two offences, may be led to choose the least hurtful — such is the third object. This last object appears humble enough; it is a species of composition with vice: a bargain is made with it, so to speak, and it is sought that the individual may be satisfied at the least possible expense.

Let us examine how it is possible to deal upon all these points with three classes of imperious desires—1. Revenge; 2. Poverty; 3. Love.

SECTION I. For the satisfaction of vindictive desires without prejudice, there are two means — 1. To provide a legal redress for every species of injury; 2. To provide a com-

petent redress for all injuries which affect honour; 3. For the satisfaction of these vindictive desires *with the least possible* prejudice, there is only one expedient: it is that of showing indulgence to duelling. Let us recapitulate these different heads.

1. *To provide a Legal Redress for every species of injury.*

The vices and the virtues of the human race depend much upon the circumstances of society. Hospitality, as has been observed, is most practised where it is most necessary. It is the same with revenge. In the state of nature, the fear of private vengeance is the only restraint of brute force — the only security against the violence of the passions: it corresponds to the fear of punishment in a state of political society. Each step in the administration of justice tends to diminish the force of the vindictive appetites, and to prevent acts of private animosity.

The interest principally in view, in legal redress, is that of the party injured. But the offender himself finds his profit in this arrangement. Leave a man to avenge himself, and his vengeance knows no limits. Grant to him what you, in cool blood, consider as a sufficient satisfaction, and prohibit his seeking for more: he will choose rather to accept what you give him, without running any hazard, than expose himself to the judgment of the law, by endeavouring to take a greater satisfaction by himself. Here, then, is an accessory benefit resulting from care to provide judicial redress. Reprisals are prevented: covered by the buckler of justice, the transgressor, after his offence, finds himself in a state of comparative security under the protection of the law.

It is sufficiently evident, that the more completely legal redress is provided, the more the motive will be diminished which might excite the party injured to procure it for himself. When every pain which a man is liable to suffer from the conduct of another, shall be followed immediately by what shall, in his eyes, be an equivalent pleasure, the irascible appetite will no longer exist. The supposition is evidently an exaggerated one; but, exaggerated as it is, it includes enough of truth to show, that each amelioration which is made in this branch of justice, tends to diminish the force of the vindictive passions.

Hume has observed, in speaking of the barbarous times of English history, that the great difficulty was to engage the injured party to receive satisfaction; and that the laws which related to satisfaction were as much intended to limit his resentment as to procure for him an enjoyment.

In addition to this, institute a legal punishment for an injury: you provide a place for generosity — you create a virtue. To pardon an injury, when the law offers a satisfaction, is to exercise a species of superiority over an adversary, by the obligation which results from it. No one can attribute the pardon to weakness: the motive is above suspicion.

2. *To provide a competent Redress for injuries which attack the Point of Honour in particular.*

This class of injuries demands so much the more particular attention, in as much as they have a more marked tendency to excite the vindictive passions. Enough has been already said upon this subject in Part I. Ch. xiv. to render a return to it unnecessary.

In this respect, the French jurisprudence has long been superior to all others.

English jurisprudence is eminently defective upon this point. It knows nothing of honour — it has no means of estimating a corporal insult but by the size of the wound. It does not suppose that there can be any other evil in the loss of reputation, than the loss of the money which may be the consequence of it. It considers money as a remedy for all evils — a palliation for all affronts. He who does not possess it, possesses nothing: he who possesses it, can want for nothing. It knows only pecuniary reparation. But the present generation ought not to be reproached with the rudeness of the ages of barbarism. These laws were established when sentiments of honour had not been developed. Questions of honour are now decided by the tribunal of public opinion, and its decrees are pronounced with a power altogether peculiar.

However, it cannot be doubted but that the silence of the law has had a bad effect. An Englishman cannot enter France without observing how much more the feeling of honour, and the contempt of money, descends, so to speak, among the inferior classes in France, than in England. This difference is especially remarkable in the army. The sentiment of glory — the pride of disinterestedness — are everywhere discovered among the common soldiers; and they would consider a noble action as tarnished by estimating its value in money: an honorary sword is the first of recompenses.

3. *To show indulgence to Duelling*

If the individual offended will not be contented with the satisfaction offered by the laws, it is proper to be indulgent to duelling. Poisoning and assassination are hardly heard of, where duelling is established. The light evil which results from it, is like a premium of assurance, whereby a nation guarantees itself against the greater evil of other offences. Duelling is a preservative of politeness and peace: the fear of being obliged to give or receive a challenge, destroys quarrels in their

germ. The Greeks and Romans, it will be said, were acquainted with glory, and knew nothing of duelling. So much the worse for them: their sentiment of glory was not opposed either to poisoning or assassination. Among the political dissensions of the Athenians, one half of the citizens plotted the destruction of the other. Compare what passes in England and Ireland with the dissensions of Greece and Rome. Clodius and Milo, according to our customs, would have fought a duel: according to Roman customs, they reciprocally sought to assassinate each other, and he who killed his adversary only forestalled him.

In the island of Malta, duelling had become a species of madness, and, so to speak, of civil war. One of the Grand Masters made such severe laws against it, and executed them so rigorously, that duelling ceased: but it was to give place to a crime which unites cowardice with cruelty. Assassination, before unknown among the knights, became so common, that they soon regretted the loss of duelling, and at last expressly tolerated it, in a certain place, and at certain hours. The result was such as had been expected. So soon as a course of honourable revenge was opened, the clandestine methods were rendered infamous.

Duels are less common in Italy than in France and England: poisoning and assassinations are much more so.

In France, the laws against duelling were severe; but methods were found for eluding them. Upon an agreement to fight, a pretended quarrel was got up as a kind of prelude.

In England, the law confounds duelling and murder: but the juries do not confound them; they pardon it, or, what amounts to the same thing, find it manslaughter (involuntary homicide.) The people are better guided by their good sense, than the jurists have been by their science. Would it not be better to place the remedy among the laws, rather than in their subversion?

SECTION II. Let us turn to indigence: we have here to consider the interests of the poor themselves and those of the community.

A man deprived of the means of subsistence, is urged, by the most irresistible motives, to commit every crime by which he may provide for his wants. Where this stimulus exists, it is useless to combat it by the fear of punishment, because there is scarcely one punishment which can be greater, and no one, which, by reason of its uncertainty and its distance, can appear so great, as the dying of hunger. The effects of indigence can therefore only be guarded against, by providing necessaries for those who have them not.

The indigent may be distinguished in this respect, into four classes: 1. The industrious poor; those who are willing to work that they may live. 2. Idle mendicants; those who prefer rather to depend upon the precarious charity of passengers for subsistence, than to labour for their subsistence. 3. Suspected persons; those who, having been arrested on account of a crime, and set at liberty because of the insufficiency of proof, have remained with a stain upon their reputation, which hinders their obtaining employment. 4. Criminals who have been confined for a time in prison, and have been set at liberty. These different classes ought not to be treated in the same manner, and in establishments for the poor, particular care ought to be taken to separate the suspected from the innocent classes. "One scabby sheep," says the proverb, "infects the flock."

Every thing which the poor can be made to earn by their labour, is not only a profit for the community, but also for themselves. Their time ought to be occupied as their lives ought to be sustained. It is humanity which prescribes the finding occupations for the deaf, the blind, the dumb, the lame, the impotent. The wages of idleness are never so sweet as the reward of toil.

If a man have been apprehended and accused of a crime of indigence, even when he is acquitted, he ought to be required to render an account of his means of subsistence at least for the last six months. If he be honest, this inquiry can do him no harm; if he be not, it is proper to act accordingly.

Females, especially those a little above ordinary labour, have a peculiar disadvantage in finding occupation. Men having more activity, more liberty, and perhaps more dexterity, even take possession of those labours which belong more properly to the other sex, and which are almost indecent in the hands of men. Men are found selling toys for children, keeping shops for fashions, &c.; making shoes, stays, and dresses for women. Men are found filling the function of midwives. I have often doubted whether the injustice of the custom might not be redressed by the law, and whether women ought not to be put in possession of these means of subsistence, to the exclusion of men. It would be an indirect method of obviating prostitution, by providing females with suitable employments.

The practice of employing men as midwives, which has excited such lively reclamations, is not yet* generally adopted, except among the higher classes, where anxiety is greatest, and in those cases when the danger appears extreme. It would therefore be dangerous to establish a legal exclusion of men, at least until female pupils had been educated, capable of replacing them.

* Written in 1782.

With respect to the treatment of the poor, no universal measure can be proposed: it must be determined by local and national circumstances. In Scotland, with the exception of some great towns, the government does not interfere with the care of the poor. In England, the tax raised for their support in 1831, exceeded £8,000,000. Their condition is, however, better in Scotland than in England: the object is better accomplished by the manners of the people, than by the laws. Notwithstanding the inconveniences of the English system, it cannot be given up all at once, otherwise the one half of the poor would perish, before the necessary habits of benevolence and frugality have taken root. In Scotland, the influence of the clergy is highly salutary: having only a moderate salary and no tithes, the clergymen are known and respected by their parishioners. In England, the clergy being rich and having tithes, the clergyman is often quarrelling with his flock, and knows little of them.

In Scotland, in Ireland, in France, the poor are moderate in their wants. At Naples, the climate saves the expense of fuel, of lodging, and almost of clothing. In the East Indies, clothing is hardly necessary, except for decency. In Scotland, domestic economy is good in all respects, except neatness. In Holland, it is also as good as it can be in every respect. In England, on the one hand, wants are greater than anywhere else, and economy is perhaps upon a worse footing than in any country in the world.

The most certain method of providing for the poor is, not to wait for indigence, but to prevent it. The greatest service which can be rendered to the working classes, is the institution of savings banks, in which, by the attractions of security and profit, the poor may be disposed to place their little savings.

SECTION III. We come now to that class of desires for which no neutral name is found, — no name which does not present some accessory idea of praise or of blame, but especially of blame; the reason of which is easily discovered. Asceticism has sought to brand and criminalize the desires to which nature has confided the perpetuity of the species. Poetry has protested against these usurpations, and has embellished the images of voluptousness and love. Its object is praiseworthy, when good manners and decency are respected. We may observe, however, that these inclinations have sufficient natural strength, and do not require the excitements of exaggerated and seductive representations.

Since this desire is satisfied in marriage, not only without prejudice to society, but in an advantageous manner, the first object of the legislator, in this respect, should be to facilitate marriage; that is to say, to place no obstacle which is not absolutely necessary in its way.

With the same view, he ought to authorize divorces under suitable restrictions. In place of a marriage broken in point of fact, and subsisting only in appearance, divorce naturally leads to a real marriage. *Separations* permitted in a country where marriages are indissoluble, have the inconvenience either of condemning the individuals to the privation of celibacy, or leading them to form illicit connexions.

But if we would speak upon this delicate subject honestly, and with a freedom more honest than an hypocritical reserve, we shall acknowledge at once, that there is an age at which man attains the developement of his powers, before his mind is ripe for the conduct of business and the government of a family. This is especially true with regard to the superior classes of society. Among the poor, necessary labour diverts the desires from love, and retards their developement. A frugal nourishment and simple kind of life maintains for a longer period a calm among the feelings and the imagination. Besides, the poor are unable to purchase the favours of the other sex, except by the sacrifice of liberty.

Independently of the youth who are not yet marriageable in a moral respect, how many men are there who are unable to undertake the charge of a wife and family! on the one hand, domestic servants, soldiers, sailors, living in a state of dependence, and often having no fixed residence; on the other hand, men of a more elevated rank, who expect a fortune or an establishment. Here is a very numerous class deprived of marriage, and reduced to a forced celibacy.

The first method which presents itself for mitigating this evil, would be the rendering legitimate contracts for a limited time. This method has great inconveniences; still concubinage really exists in all societies in which there is considerable disproportion in fortunes. In prohibiting these arrangements, they are not prevented; they are only rendered criminal and degraded. Those who dare to acknowledge them, proclaim their contempt for manners and laws; those who conceal them are exposed to suffer from the moral sanction, in proportion to their sensibility.

In the ordinary course of thinking, the idea of virtue is associated with this contract when its duration is indefinite, and the idea of vice when it is limited for a time. Legislators have followed this opinion: prohibition against making the contract for a year — permission to make it for life; — the same action, criminal in the first place, will be innocent in the other. What can be said for this difference? The duration of the engagement? — can it change black into white?

But if marriage for a limited time is inno-

cent in itself, it does not follow that it is so honourable for the woman who contracts it: she can never obtain the same respect as a wife for life. The first idea which presents itself with respect to her is, "If this woman were of equal value with others, she would have obtained the same condition as others: this precarious arrangement is a sign of inferiority, either in her condition or in her merit."

What, then, would be the advantage resulting from this kind of contract? The law which now forbids it would not be continually broken and despised. It would also protect the female, who lends herself to this arrangement, from a humiliation which, after having degraded her in her own eyes, almost always leads her to the lowest degree of debauchery. It would, in fine, prove the birth of the children, and secure to them paternal care. In Germany, marriages known under the name of *left-handed marriages*, were generally established. The object was to conciliate domestic happiness with family pride. The woman thus acquired some of the privileges of a wife, but neither she nor her children took the name nor the rank of her husband. In the code of Frederick they were prohibited; the king still reserving to himself the right to grant particular dispensations.

Whilst an idea so contrary to received opinions is proposed, it may be observed that it is not proposed as a good, but as an amelioration of an evil which exists. Where manners are sufficiently simple, where fortunes are sufficiently equal not to require this expedient, it would be absurd to introduce it. It is not proposed as a rule, but as a remedy.

Under a similar apology, a more weighty disorder may be spoken of. It is an evil which particularly exists in great towns, which also arises from the inequality of fortunes, and the concurrence of all the causes which increase celibacy. This evil is prostitution.

There are some countries where the laws tolerate it; there are others, as in England, where it is strictly forbidden: but though forbidden, it is as commonly and as publicly carried on as can be imagined, because the government dares not to punish it, and the public would not approve of this employment of authority. Prostitution, prohibited as it is, is not less extended than if there were no law; but it is much more mischievous.

The infamy of prostitution is not solely the work of the laws. There is always a degree of shame attached to this condition, even when the political sanction remains neuter. The condition of courtezans is a condition of dependence and servitude: their resources are always precarious; they are always on the borders of indigence and hunger. Their name connects them with those evils which afflict the imagination. They are justly considered as the causes of those disorders of which they are, at the same time, the victims. There is no need to mention the sentiments with which they are regarded by *modest* females: the most virtuous pity them; all agree in despising them. No one seeks to defend or to uphold them. It is therefore natural that they should be crushed by the weight of opinion. They have themselves never been able to form a society which could counterbalance this public contempt: when they shall wish to form it, they will be unable. If the interest of a common defence should unite them, rivalry and want would separate them. The person, as well as the name, of a prostitute, is an object of hatred and disdain to all her fellows. It is, perhaps, the only condition openly despised by the persons who publicly profess it. Self-love, by the most striking inconsistency, seeks to blind itself to its own misfortune: it appears to forget what is is, or to make an exception for itself, by severely treating its companions.

Kept mistresses very nearly partake the same infamy with open prostitutes. The reason for it is simple: they are not yet in that class, but they seem always ready to fall into it. However, the longer the same person has lived with the same man, the more she is removed from the degraded condition—the more she approaches to the condition of a modest woman. The greater the duration of the connexion, the more difficult it appears to be broken; the greater the hope it presents of perpetuity.

What is the result of these observations? It is, that the remedy, so far as a remedy can exist, is in the evil itself. The more this condition is naturally the object of contempt, the less necessary is it to add any legal disgrace. It carries with it its natural punishment—punishment which is already too heavy, when every thing which should lead to commiseration in favour of this unfortunate class has been considered — the victims of social inequality, and always so near to despair. How few of these females have embraced this condition, from choice, and knowing the consequences! How few would continue in it, if they could quit it — if they could leave this circle of ignominy and misfortune — if they were not repulsed from every career which they may try to open for themselves! How many have fallen into it from the error of a moment — from the inexperience of youth — from the corruption of their parents — by the crime of the seducer — from inexorable severity — directed against a first fault — almost all from neglect and misery. If opinion be unjust and tyrannical, ought the legislator to exasperate this injustice? ought he to employ this instrument of tyranny?

Besides, what is the effect of these laws?

It is to increase the corruption of which these unhappy women are accused;—it is to precipitate them into intemperance and excess in the use of intoxicating liquors, that they may find in them a momentary oblivion of their misery;—it is to render them insensible to the restraint of shame, by directing against their misfortune that opprobrium which ought to be reserved for real crimes;—it is, in fine, to prevent the precautions which might soften the inconveniences of this disorder, if it were tolerated. All these evils, which the laws lavish without care, are a foolish price which the laws pay for an imaginary good, which is not, and can never be obtained.

The Empress-queen of Hungary undertook to extirpate this evil, and laboured with a perseverance praiseworthy in its principles, and deserving of a better cause. What followed? Corruption extended itself in public and private life: the conjugal bed was violated: the seat of justice was corrupted; adultery gained all that was lost by prostitution: the magistrates made a trade of their connivance; fraud, prevarication, oppression, extortion, spread themselves in the country, and the evil which it was sought to destroy, being obliged to hide itself, only became more dangerous.

Among the Greeks, this profession was tolerated, sometimes even encouraged; but it was not allowed to parents to traffic in the honour of their daughters. Among the Romans, in what are called the best times of their republic, the laws were silent upon the subject. The saying of Cato, to the young man whom he met on leaving a place of ill name is a proof of it: Cato was not a man to encourage the violation of the laws.

In the metropolis of the christian world, this vocation is openly exercised.* This was without doubt one of the reasons for the excessive rigour of the protestants.

At Venice, the profession of a courtezan was publicly authorized under the republic.

In the capital of Holland, houses of this nature receive a licence from the magistrate.

Retif de la Bretonne published an ingenious work, entitled *Pornographe*, in which he proposed to government to found an institution, subject to regulations, for the reception and government of prostitutes.

The toleration of this evil is useful in some respects in great towns: its prohibition is useless; it has even particular inconveniences.

The hospitals established in London for repentant girls are good institutions: but those who regard prostitution with absolute rigour are not consistent with themselves, when they approve of these charitable foundations. If they reform some, they encourage others. The hospital at Chelsea, is it not an encouragement for soldiers? and that at Greenwich, for sailors?

It would be desirable to institute annuities, commencing at a certain age: these annuities should be adapted to this sad condition, in which the period of harvest is necessarily short, but in which there are sometimes considerable profits.

The spirit of economy springs up with little encouragement, and always goes on increasing a sum too small to offer any resource, as actual capital may yield a considerable annuity at a distant period.

Upon points of morality, where there are contested questions, it is well to consult the laws of different nations. This is to the mind a species of travelling. In the course of this exercise, whilst the usages of other nations pass in review before us, we become disengaged from local and national prejudices.

CHAPTER VI.

PROBLEM III.

To avoid furnishing Encouragement to Crimes.

To say that government ought not to reward crimes—that it ought not to weaken the moral sanction, or the religious sanction, in those cases in which they are useful, is a maxim which appears too simple to require proof. It is, however, often forgotten: striking examples of this forgetfulness will be given; but the more striking they are, the less will it be necessary to develope them: it will be more desirable to dwell upon those cases in which this maxim is violated in a less evident manner.

1. *Unjust Detention of Property, &c.*

If the law suffer a man who unjustly detains the property of another to make a profit by delaying the payment, it becomes an accomplice in the wrong. The cases in which the English law is defective in this respect are innumerable. In many cases, a debtor has only to refuse payment till he die, in order to free himself from the principal of his debt: in many others, he may by his delays free himself from the interest: in all, he may retain the capital, and obtain, so to speak, a forced loan at the ordinary rate of interest.

To put a stop to this source of iniquity, it would be sufficient to establish—1*st*, That in matters of civil responsibility with regard to lands, the death of one or other of the parties should make no alteration; 2*d*, That interest should be payable from the commencement of the obligation; 3*d*, That the obligation should commence, not at the ascertaining the amount of the damage, but at the time of the damage itself; 4*th*, That the interest arising

* Writing 1782. This is not true at this time, 1830. It remains to be seen if this severity be beneficial to good manners.—*Dumont.*

from this obligation exceed the ordinary rate. These methods are extremely simple: how does it happen that they remain yet to be proposed? Those who thus inquire, know little of the effect of custom, indolence, indifference to the public welfare, and the bigotry of the law, without reckoning on the effect of personal interest and party spirit.

2. *Unlawful Destruction.*

When a man insures his goods against any calamity, if the value for which he insure exceed the value of the effects insured, he has in a certain sense an interest in producing the event insured against — to set fire to his house, if he be insured against fire — to sink his vessel, if he be insured against sea risks. The law which authorizes these contracts may therefore be considered as furnishing a motive to the commission of these crimes. Does it follow that it ought to refuse them its sanction? By no means; but only that it ought to direct and suggest to the assurers the precautions most likely to prevent these abuses, without being so restrictive as to hinder their operations. The taking preliminary informations — requiring certificates of the real value of the goods insured — requiring, in cases of accident, the testimony of certain respectable persons, as to the character and probity of the party who has been insured — submitting the effects insured to examination, in every state of the cause, when the assurer has any doubts, &c. Such are a part of the measures to be taken.

3. *Treason.*

If it be permitted to insure the vessels of enemies, a state may be exposed to two dangers: — 1*st*, The commerce of an inimical nation, which is one of the sources of its power, is facilitated. 2*d*, The assurer, in order to guarantee himself against a loss, may give secret intelligence to the enemy as to the departure of the armaments and cruisers of his own nation. With respect to the first inconvenience, it is only an evil in case the enemy could not insure his vessels elsewhere, or that he could not employ his capital with the same profit in any other branch of trade. With respect to the second inconvenience, it is absolutely nothing, unless the assurer be able to give to the enemy information that he could not obtain in any other manner for money, and that the facility of giving this information was so great as to lead him to disregard the infamy and the risk of treason. Such is the state of things as to its inconveniences.

On the other hand, its advantages for the nation assuring is certain. In this species of traffic, it has been found that the balance of profit in a given time is on the side of the assurers; that is to say, in taking all the losses and gains together, he receives more in premiums than he pays in reimbursements. It is then a lucrative branch of commerce, and may be considered as a tax levied upon the enemy.

4. *Peculation.*

In making a bargain with architects and superintendents, it is common to give them a per-centage upon the amount of the expense. This mode of payment, which appears sufficiently natural, opens a door for peculation — for peculation of the most destructive kind, in which, in order that the peculator may make a small profit, it is necessary that his employer should suffer a large loss.

This danger is at its highest degree in public works, in which no individual has a particular interest in preventing profusion, and each may find his interest in conniving at it.

One of the means of remedying it is to fix a sum in accordance with an estimate made, and to say to the superintendent — Thus far you shall have so much per cent.; above this you shall have nothing. If you reduce the expense below the estimate, you shall have your profit as upon the whole sum.

5. *Abuse of the Confidence of the Sovereign.*

If a statesman who has the power of contributing to war or to peace, possess an employment of which the emoluments are larger in time of war than in time of peace, an interest is given to him to make use of his power in order to prolong or create a state of war. If his emoluments increase in proportion to the expense, an interest is given him to conduct such war with the greatest possible prodigality. The inverse reason would be much better.

6. *Offences of every kind.*

When a man lays a wager upon the affirmative side regarding a future event, he has an interest proportioned to the value of the wager in the happening of the event. If the event be among the number of those prohibited by the laws, he has an interest in committing an offence. He is even stimulated by a double force, one part of which possesses the nature of reward, the other possesses the nature of punishment: the reward, what he will receive if the event happen; the punishment, what he will have to pay in the contrary case. It is as if he were suborned by the promise of a sum of money on the one hand, and that he had made an engagement under an explicit punishment on the other.*

If, then, all wagers, without distinction,

* In the Adventures of a Guinea, a wager is made between the wife of a clergyman, and the wife of a minister of state, that the clergyman would not be made a bishop. It may be guessed which of the two wins the bet.

were recognised as valid without restriction, venality of every kind would receive the sanction of the laws, and liberty would be given to all the world to enrol accomplices for every kind of crime. On the other hand, if all wagers without restriction were annulled, the insurances so advantageous to commerce, so helpful against a multitude of calamities, would have no place; for these insurances are only a species of wager.

The desirable medium seems to be this:—In all cases when the wager may become the instrument of mischief without answering any useful object, prohibit it absolutely: in those cases in which, as an insurance, it may become a means of help, admit it; but leave a discretion to the judge to make the necessary exceptions, when he finds that it has been made a cloak for subornation.

7. *Reflective Offences, or Offences against One's self.*

When a lucrative place has been conferred upon a man, the possession of which depends upon his submission to certain rules of conduct, if these rules are such as to be hurtful to himself, without producing any benefit to any other person, the creation of such an office has the effect of a law diametrically opposed to the principle of utility—of a law which tends to augment the sum of pains, and to diminish that of pleasures.

Such institutions are monasteries in catholic countries; such also are the remains of the monastic spirit in the English universities.

But it may be said, since no one engages in such a condition without his own consent, the evil is only imaginary. This answer would be good, if the obligation ceased so soon as the consent ceased: the misfortune is, that the consent is the work of a moment, and the obligation is perpetual. There is another case, indeed, in which a transitory consent is admitted, as the ground of durable condition: it is that of military enlistment. But the utility of the rule, or, to speak more correctly, its necessity, is its justification. The state could not exist without its army; and the army could not exist, if all who compose it were at liberty to leave it whenever they pleased.

CHAPTER VII.

PROBLEM IV.

To augment the Responsibility of Individuals, in proportion as they are more exposed to temptation to do wrong.

THIS rule principally regards the public servants. The more they have to lose in respect of fortune or honours, the more may be taken from them. Their salaries are a source of responsibility. In case of malversation, the loss of this salary is a punishment from which they cannot escape, even when they can escape from all others. This method is especially suitable in those employments which give the management of the public property. If you cannot otherwise secure the probity of a cashier, make the amount of his appointments a little exceed the interest of the greatest sum which is entrusted to him. This excess of salary may be considered as a premium paid for an insurance against his dishonesty: he has more to lose by becoming a rogue than by remaining an honest man.

Birth, honours, family connexions, religion, may also become so many sources of responsibility—so many pledges for the good conduct of individuals. There have been cases in which legislators would not trust bachelors: they have regarded a wife and children as hostages given by the citizen to his country.

CHAPTER VIII.

PROBLEM V.

To diminish Sensibility with regard to Temptation.

THE preceding chapter referred to precautions against the improbity of an individual: the present chapter treats of the means of preserving the probity of the honest man, by not exposing him to the overpowering influence of seductive motives.

We shall first speak of salaries. Money, according to the manner in which it is employed, may serve either as a poison or an antidote.

Without regard to the happiness of individuals, the interest of the public service requires that public officers should be raised above want, in all employments which present the means of acquiring money in a prejudicial manner. In Russia, the greatest abuses, in all the departments of government, have been found to arise from the insufficiency of salaries. When men, oppressed by want, become avaricious extortioners and thieves, the blame ought to be divided between them and the government which has spread the snare for their probity. Placed between the necessity of living, and the impossibility of living honestly, they are led to consider extortion as a lawful supplement, tacitly authorized by those who employ them.

Will the supply of what is physically nenecessary suffice to place them above want? No: if there be not a certain proportion between the dignity with which a man is invested and his means of sustaining it, he is in a state of suffering and privation, because he cannot comply with what is expected of him; and he is compelled to remain upon the verge of the class with whom he is called to

associate. In a word, wants increase with honours, and relative necessity changes with condition. Place a man in an elevated rank, without giving him the means of maintaining it, what will be the result? His dignity will furnish a motive for evil-doing, and his power will furnish him with the means of evil-doing.

Charles II., when restricted by the economy of his parliament, sold himself to Louis XIV., who offered to supply his profusion. The hope of relieving the embarrassments in which he was plunged, led him, like an individual overwhelmed with debts, to the employment of criminal resources. This miserable economy cost the English two wars, and a more disastrous peace. It is true, that it is difficult to discover what sum would have operated as an antiseptic with a prince thus corrupted; but this example is sufficient to show, that the civil list of the kings of England, which appears exorbitant in the eyes of common calculators, is in the eyes of a statesman a measure of general security. Besides, from the intimate connexion which exists between wealth and power, every thing which increases the splendour of dignity increases its power; and royal pomp may, in this respect, be compared to those ornaments of architecture, which serve, at the same time, to support and bind the building together.

This great rule of diminishing, as much as possible, sensibility to temptation, has been singularly violated in the Catholic Church. Imposing celibacy upon the priests, and confiding to them the most delicate functions — the examination of consciences, and the direction of families — was placing them in a trying situation, between the unhappiness of observing a useless law, and the opprobrium of its violation.

When Gregory VII. directed, in a council at Rome, that the married clergy, or those who had concubines, should not say mass, he excited their cries of indignation: they accused him of heresy, saying, according to the historian of the times, "If he persist, we would rather renounce the priesthood than our wives: he must seek for angels to govern the churches." — (*Histoire de France par l'Abbe Millot*, tom i. *Regne de Henri I.*)

In our days it has been proposed to allow the French priests to marry; but there were no men found among them, they were all angels.

CHAPTER IX.

PROBLEM VI.

To strengthen the Impression of Punishments upon the Imagination.

IT is the real punishment which produces all the evil: it is the apparent punishment which produces all the good. It is proper to diminish the first, and to augment the second, as much as possible. Humanity consists in the appearance of cruelty.

Speak to the eyes, if you would move the heart. This precept is as old as the age of Horace, and the experience which dictated it, as old as the first man: — every one has felt its force and endeavoured to profit by it; the actor, the rogue, the orator, the priest, all know its prevailing power. Render, therefore, your punishments exemplary; give to the ceremonies which accompany them a mournful pomp; call to your assistance all the imitative arts; and let the representation of these important operations be among the first objects which strike the eyes of childhood.

A scaffold painted black, the livery of grief—the officers of justice dressed in crape—the executioner covered with a mask, which would serve at once to augment the terror of his appearance, and to shield him from ill-founded indignation — emblems of his crime placed above the head of the criminal, to the end that the witnesses of his sufferings may know for what crimes he undergoes them: these might form a part of the principal decorations of these legal tragedies; whilst all the actors in this terrible drama might move in solemn procession — serious and religious music preparing the hearts of the spectators for the important lesson they were about to receive. The judges need not consider it beneath their dignity to preside over this public scene, and its sombre dignity should be consecrated by the presence of the ministers of religion.

Instruction should not be rejected when it is offered, even by the most cruel enemy. The Vehemic Council, the Inquisition, the Star-Chamber, may all be consulted, all their methods examined and compared. A diamond is worth preserving, though covered with mud. If assassins employ pistols for the commission of murder, is this a reason why I should not use them in self-defence?

The emblematic dresses of the inquisition might be usefully employed in criminal justice: an incendiary under his cloak, painted with flames, would present to all eyes the image of his crime, and the indignation of the spectator would be fixed upon the idea of his crime.

A system of punishments, accompanied with emblems appropriated as much as possible to each crime, would possess an additional advantage: it would furnish allusions for poetry,* for eloquence, for dramatic authors, for ordinary conversation. The ideas derived from them would, so to speak, be reverbe-

* See in Juvenal, his allusion to the punishment of parricides: —

Cujus supplicio non debuit una parari
Simia non serpens unus, &c.

rated by a thousand objects, and disseminated on all sides.

The Catholic priests have known how to derive from this source the greatest assistance for augmenting the efficacy of their religious opinions. I recollect having seen, at Gravelines, a striking exhibition: a priest showed to the people a picture, in which was represented a miserable multitude in the midst of flames, and one of them was making a sign that he wanted a drop of water, by showing his burning tongue. It was a day appointed for public prayers, for drawing souls out of purgatory. It is evident, that such an exhibition would tend less to inspire a horror for crimes, than a horror of the poverty which did not allow him to be redeemed. The necessary consequence is, that money for the purchase of masses must be obtained at any rate; for where every thing is to be expiated by money, misery alone is the greatest of all crimes, the only one which has no resource.*

The ancients have not been more happy than the moderns in the choice of punishments: no design, no intention, no natural connexion between punishments and crimes, can be discovered; every thing is the work of caprice.

I shall not dwell upon a point which has for a long time been familiar to all who are capable of reflection. The modes of punishment in England form a perfect contrast with every thing which inspires respect: A capital execution has no solemnity. The pillory is sometimes a scene of buffoonery; sometimes a scene of popular cruelty—a game of chance, in which the sufferer is exposed to the caprices of the multitude and the accidents of the day. The severity of a whipping depends upon the money given to the executioner. Burning in the hand, according as the criminal and the executioner can agree, is performed either with a cold or a red-hot iron; and if it be with a hot iron, it is only a slice of ham which is burnt: to complete the farce, the criminal screams, whilst it is only the fat which smokes and burns, and the knowing spectators only laugh at this parody of justice.

But it may be said, that every question has two sides—that these real representations, these terrible scenes of penal justice, will spread dismay among the people, and make dangerous impressions. I do not believe it. If they present to dishonest persons the idea of danger, they offer only an idea of security to those who are honest. The threat of terrible and eternal punishment for undefined and indefinite crimes, working upon an active imagination, may have sometimes produced madness. But here no undefined threatenings are supposed: on the contrary, here is a manifest crime proved—a crime which no one need commit; and consequently the dread of punishment can never rise to a dangerous height. It would, however, always be desirable to guard against producing false and hateful ideas.

In the first edition of the Code Theresa, the portrait of the empress was surrounded with medallions, representing gibbets, racks, fetters, and other instruments of punishment. What a blunder, to present the image of the sovereign surrounded by these hideous emblems! This scandalous frontispiece was suppressed; but the print, representing all the instruments of torture, was allowed to remain. A sad picture, which could not be considered without each one saying to himself, Such are the evils to which I am exposed, although innocent! But if an abridgment of the penal code were accompanied with prints representing the characteristic punishments set apart for each crime, it would form an imposing commentary—a sensible and speaking image of the law. Each one might say, That is what I shall suffer, if I become guilty. It is thus that, in matters of legislation, a slight difference sometimes separates what is good from what is bad.

CHAPTER X.

PROBLEM VII.

To facilitate the Discovery of Offences committed.

IN penal matters, the judge must be acquainted with two things before he can exercise his office: the fact of the offence, and

* At the commencement of the reigns of the kings of Poland, there existed a very singular custom:—

"A bishop of Cracow, murdered by his king in the eleventh century, cited to his tribunal, that is, to the chapel where his blood was shed, the new king, as if he had been guilty of the misdeed. John repaired thither on foot, and replied, as his predecessors had done, that the crime was atrocious, that he was innocent of it, that he detested it, and in asking pardon for it, implored the protection of the holy martyr upon himself and his kingdom. It is to be wished, that in all states they had thus preserved the monuments of the crimes of kings: flattery has discovered in them only virtues."—*History of John Sobiesky, by l'Abbe Coyer*, vol. ii. p. 104.

This is a singular fact, and proves the great skill of the clergy in seizing upon the imagination, and making an impression upon the minds of men. How well every thing was calculated in this ceremony, to render the person of a bishop holy and sacred in the eyes of the king and of the nation! This crime, which no time could efface—this blood, which always cried out—this new king, who seemed to inherit the malediction of the misdeed, until he had disavowed it—this first act of his reign, a kind of honourable fine, for violence committed ages before,—here is a solemnity well directed to its end; whilst, as to the wish of the Abbe Coyer, it is without doubt good, but he ought to have taught us the means of accomplishing it.

the person of the offender. These two things being known, his knowledge is complete. According to the difference of cases, obscurity spreads itself over these two points in different proportions. Sometimes it is greatest upon the first, sometimes upon the second. We shall treat, in the following articles, of what relates to the fact of the offence, and of the means by which its discovery may be facilitated.

ART. I. — *Require written Title-Deeds.*

It is only by writing, that evidence can be rendered permanent and authentic. Verbal transactions, at least when not of the simplest kind, are subject to interminable disputes. *Litera scripta manet.* Mahomet himself has recommended his followers to observe this precaution. It is almost the only passage of the Koran which has a grain of common sense. *(Chapter of the Cow.)*

ART. II.—*Cause the Names of the Witnesses to be attested upon the head of Title-Deeds.*

It is one thing to require that there should be witnesses to the execution of a deed: it is another point to require that their presence be notified, attested, enregistered at the head of the deed. A third circumstance is, to add to it those circumstances by which the witnesses, if necessary, may be easily found.

In the attestation of deeds, it would be useful to observe the following precautions:—

1. Prefer a great number of witnesses to a small number. This diminishes the danger of prevarication, and increases the chance of finding them, if necessary. 2. Prefer married to single persons; heads of families to servants; persons of public character to individuals less distinguished; young men in the flower of their age to old and infirm persons; persons who are known, to those who are unknown. 3. When a deed is composed of many sheets or pieces, each piece ought to be signed by the witnesses. If there be corrections or erasures, a list of these should be made and attested; the lines ought to be counted, and the number in each page indicated. 4. Each witness should add to his Christian and surname, if it be required, his quality, his residence, his age, his condition, whether single or married. 5. The time and place of the execution of the deed should be minutely specified; the time not only by the day, the month, the year, but also by the hour; the place by the district, the parish, even by the house, and by the name of him who occupies it at the time. This circumstance is an excellent preservative against forgery. A man will fear to embark in such an enterprise, when it is necessary to be acquainted with so many details before he affixes a supposititious date to a deed; and if he do attempt it, it will be more easily discovered. 6. Numbers ought to be written in words at length, especially dates and sums; except in matters of account, in which case it is sufficient to state the total in words at length; except also when the same date or the same sum frequently recurs in the same deed. The reason of this precaution is, that figures, if they are not very carefully written, are liable to be taken the one for the other; and besides that, they are easily altered, and the slightest alteration may have considerable effects: 100 is easily converted into 1000. 7. The forms to be observed in the execution of a deed ought to be printed upon the margin of the sheets of paper or parchment on which it is written.

Ought these forms to be left to the discretion of individuals as a means of security required by prudence, or ought they to be rendered obligatory? Some ought to be made obligatory; others ought not. As to those which ought to be made obligatory, it will be proper to allow the judges latitude, that they may distinguish the cases in which it was not possible to attend to them. It may be that a deed has been executed in a place where the prescribed paper could not be obtained; where a sufficient number of witnesses could not be found, &c. The deed might be provisionally declared valid, until it had been possible to attend to the forms required.

Greater latitude ought to be allowed in wills, than in deeds between living parties. Death waits neither for lawyers nor witnesses, and men are accustomed to defer making them to a time when they have neither leisure nor time to correct and review. On the other hand, these sorts of deeds are those which require the most precaution, because they are most subject to imposture. In the case of a deed between living parties, the party to whom it may be wished to attribute an engagement may chance to be living to contradict it. In the case of a will, this chance no longer exists.

It would require many details to point out the points to be established and the exceptions to be made. I only observe, that great latitude must be left; that no formality can be found so simple, that its omission ought to render a deed absolutely invalid.

When such instructions as these shall have been published by government, even without being rendered necessary, every body will seek to observe them, because each one will seek, in a deed honestly executed, to obtain for himself all possible security. The omission of these forms, therefore, would form a strong ground of suspicion of fraud, unless such omission could clearly be attributed to the ignorance of the parties, or to circumstances which rendered such omission unavoidable.

ART. III. — *Institute Registers for the Preservation of Titles.*

Why ought deeds to be registered? What deeds ought to be registered? Ought the registers to be secret or public? Ought registration to be optional, or ought its omission to be liable to punishment?

Registers would be useful as guards — 1*st*, against the fabrication of forged deeds; 2*d*, against forgery by falsification; 3*d*, against accidents — the loss or destruction of the original; 4*th*, against double alienation of the same property to different persons.

For the first and last of these objects, a simple memorial would be sufficient; for the second, an exact copy would be required; for the third, an extract would be sufficient, but a copy would be better.

Against forgery by fabrication, registration would only be useful if it were obligatory; nullity in cases of omission, with latitude for accidental cases. The advantage which would result is, that after the period for registration was expired, the fabrication of a deed which, according to its apparent date, ought to be registered, would fail of itself. The period in which a fraud of this kind could be committed with probability of success would be limited to a short space, and that so near a time to that of the supposed deed, that the proofs of fraud could scarcely be wanting.

It would also be necessary that registration should be obligatory under pain of nullity, if it be designed to prevent double alienations, such as mortgages or marriage contracts. Without this obligatory clause, registration would scarcely take place, because neither party would have any interest in it. He who alienates, has even a contrary interest: an honest man may dislike to have it known that he has sold or mortgaged his property; a rogue would desire the power of receiving its value twice over.

Wills are the kind of deeds most liable to be fabricated. The most certain protection against a fraud of this nature is to require their registration, under pain of nullity, during the life of the testator. It may be objected, that this would make him dependent on the mercy of those who surround him in his last moments, since he would no longer be able to reward or punish them; but this inconvenience might be obviated by allowing a testator to dispose of a tenth of his property by a codicil.

What deeds ought to be registered? All those in which a third person is interested, and whose importance is sufficiently great to justify this precaution.

Of what deeds ought the registration to be secret? and of what public?

Deeds between living persons, in which third persons are interested—mortgages, marriage-contracts, ought to be public. Wills, during the life of the testator, ought to be inviolably secret. Promissory deeds, apprentice indentures, marriage-contracts which do not bind landed property, might be kept secret, reserving the right of communicating them to persons who could present a special title to examine them.

The office ought then to be divided into secret and public departments, free or obligatory. Free registrations would be frequent, if the charge were moderate. Prudence directs the preservation of copies against accidents; but where could copies be better preserved than in a depot of this kind?

The necessity of registering deeds by which territorial property is charged, by way of mortgage, would be a species of restraint upon prodigality. A man could hardly, without some degree of shame, borrow upon his possessions to spend in pleasure. This consideration, which ought to operate in favour of this measure, has been urged as an objection against it, and has prevented its establishment.

The jurisprudence of many countries has adopted more or less of this mode of registration. That of France appears to have hit the happy medium.

In England, the law varies. In Middlesex and the county of York, register-offices were established in the reign of Queen Anne, whose principal object has been to prevent double alienations; and the good effects have been such, that the value of land is higher in these two counties than elsewhere.

Ireland enjoys this benefit, but registration is left to the free choice of individuals. It has been established in Scotland: wills ought there to be registered before the death. In the county of Middlesex, registration is only obligatory after the death of the testator.

ART. IV. — *Method of preventing Forged Deeds.*

There is one expedient which might have place as a species of registration. A particular kind of paper or parchment should be required for the deed in question: those who sold it by retail should be prohibited from selling it without indorsing the day and year of the sale, and the names of the seller and buyer. The distribution of this kind of paper might be limited to a certain number of persons, of whom a list should be kept. Their books being required to be correct registers, should, after their death, be deposited in an office. This precaution would hinder the fabrication of all kinds of deeds pretending to a distant date.

It would be a further restraint if the paper ought to be of the same date with the deed itself. The date of the paper might be marked

in the paper itself, in the same manner as the maker's name. In this case, no forged deed could be made without the concurrence of a paper-maker.

ART. V. — *Institute Registers for Events which serve to establish Titles.*

Much need not be said upon the evident necessity of proving births and burials. Prohibition to inter the dead, without the previous inspection of some officer of police, is a general precaution against assassination. It is singular, that, in England, marriages, instead of being by writing, were for a long time left to the simple notoriety of a transitory ceremony. The only reason which can be given for it, is the simplicity of this contract, which is the same for all, except in particular arrangements relative to fortunes.

Happily, under the reign of William III., these events, which serve as the foundation of so many titles, presented themselves as suitable objects for taxation; they were required to be registered. The tax has been suppressed, but the advantage remains.

Even at the present time, the security given to the rights which depend upon these events is neither so certain nor so universal as it ought to be. There exists only one copy: the register of each parish ought to be transcribed in a more general office. In the marriage-act under George II., the advantage of this regulation is refused to Quakers and Jews, either from intolerance or inadvertency.

ART. VI. — *Put the People on their guard against different Offences.*

1. *Against Poisoning.*

Give instructions with regard to the different poisonous substances, the methods of detecting them, and their antidotes. If such instructions were indiscriminately spread among the multitude, they might do more hurt than good. This is one of those cases in which knowledge is more dangerous than useful. The methods of employing poison are more certain than the means of cure. The suitable medium lies in limiting the circulation of these instructions to the class of persons who can make a good use of them, whilst their situation, their character, and their education, would be guarantees against their abuse. Such are the parochial clergy, and medical practitioners: with this view, the instructions might be in Latin, which these parties are reputed to understand.

But as to the knowledge of those poisons which present themselves without being sought, and which ignorance may innocently administer, this ought to be rendered as familiar as possible. There must be a strange deprivation in the character of a nation, if hemlock, which is so easily confounded with parsley, and verdigris, which so speedily collects in copper vessels when the tinning is worn off, were not more often administered by mistake than by design. In this case, there is more to be hoped for than feared from the communication of knowledge, how dangerous soever it may be.

2. *Against False Weights and Measures.*

Give instructions as to false weights, false measures, false standards of quality, and the methods of deception which may be used when just weights and measures are employed. To this head would be referred scales with unequal arms, measures with double bottoms, &c. Knowledge on these subjects cannot be too widely extended. Every shop should have such instructions openly exhibited, as a proof that there is no wish to deceive.

3. *Against Frauds with respect to Money.*

Give instructions showing how good may be distinguished from bad money. If a particular kind of false coin appear, government ought to give notice of this circumstance in a particular manner. At Vienna, the mint does not fail to notify the kinds of counterfeits it discovers; but the coinage is upon so good a footing, that attempts of this kind are rare.

4. *Against Cheating at Play.*

Give instructions with regard to false dice, as to methods of cheating in dealing cards, by making signs to associates, by having accomplices among the spectators, &c. These instructions might be suspended in all places of public resort, and presented in such a manner as to put youth upon its guard, and to exhibit vice as both ridiculous and hateful. It would be proper also to offer a reward to those who detect the artifices of sharpers, in proportion as they invent new schemes.

5. *Against the Impostures of Beggars.*

Some, though in perfect health, counterfeit sickness; others cause a slight wound to assume the most disgusting appearances; others relate false histories of shipwrecks and fires; others borrow or steal children, that they may employ them as instruments of their trade. It would be proper to accompany the instructions respecting these artifices with an advertisement, for fear that the knowledge of so many impostures should harden the heart, and render it indifferent to real misery. In a country under a well regulated police, an individual who presents himself under so unfortunate an aspect ought neither to be neglected nor left to himself: the duty of the first person who meets him should be to consign him to the hands of public charity. Instructions of this kind would form homilies

for the people, more amusing than controversial discourses.

6. *Against Theft, Cheating, and other means of obtaining Money under false pretences.*

Give instructions which should develope all the methods employed by thieves and cheats. There are many books upon this subject, of which the materials have been furnished by penitent malefactors, in the hopes of deserving pardon. These compilations are generally very bad, but useful extracts might be taken from them. One of the best is, *The Discoveries and Revelations of Poulter, otherwise Baxter*, which passed through sixteen editions in the space of twenty-six years. This shows how wide a circulation an authentic book of this kind, published and recommended by government, would have. The tone which might be given to these works would make them excellent lessons in morality, as well as books of amusement.*

7. *Against Religious Impostures.*

Give instructions with regard to crimes committed by means of superstitions, relating to the malice of spiritual agents. These crimes are too numerous; but they are a light matter, in comparison with the legal persecutions which have taken their rise in the same errors. There is scarcely a Christian nation which has not to reproach itself with bloody tragedies occasioned by a belief in sorcery.

The histories of the first class would furnish an instructive subject for homilies, which might be read in the churches; but there is no need to give a sad publicity to the second. The suffrages of so many respectable and upright judges, who have been the miserable dupes of this superstition, would rather serve to confirm the populace in their error, than to cure them.

The English statutes were the first which had the honour of expressly rejecting from the penal code the pretended crime of sorcery. In the Code Theresa, though compiled in 1773, it occupies a considerable space.

ART. VII.—*Publish the price of Merchandise, in opposition to Mercantile Extortion.*

If the exaction of an exorbitant price cannot properly be treated as an offence, and subjected to punishment, it may at least be looked upon as an evil, which it would be advantageous to suppress, if it could be done without causing greater evils.

Direct punishments being inadmissible, indirect methods must be employed. Happily, this is a species of offence of which the evil is diminished, rather than increased, by the number of offenders. What should the law do? increase their number as much as possible. Is an article sold too dear? is the profit gained by it exorbitant? spread this information: the dealers in it will assemble from all quarters, and by the effect of their competition alone, will lower the price.

Usury may be ranked under the head of mercantile extortion. To lend money, is to sell present money for future money: the time of payment may be either determinate or indeterminate; dependent, or not, upon certain events; the amount returnable all at once, or by instalments, &c. Prohibit usury: by rendering the transaction secret, you increase the price.

ART. VIII.—*Publish an Account of Official Rights.*

Almost everywhere, certain rights are annexed to the services of government offices: these rights form part of the pay of the persons employed. As an artisan sells his manufacture, a public officer sells his labour as dear as possible. Competition, the facility of going to another market, retains this disposition within due bounds as respects ordinary labour; but by the establishment of an office, all competition is taken away; the right to sell this particular kind of service becomes a monopoly in the hands of the person employed.

Leave the price to the discretion of the seller, and there will be no other limits than those prescribed by the wants of the buyer. The rights of officers ought therefore to be exactly determined by law, otherwise the extortion which may take place, ought to be imputed to the negligence of the legislator, rather than the rapacity of the person employed.

ART. IX.—*Publish all Accounts in which the Nation is interested.*

When accounts are rendered in a limited time, before a limited number of auditors, and these auditors, perhaps chosen or influenced by the accountant himself, and no one is afterwards called upon to controul them, the greatest errors may be passed without being perceived, or without being noticed; but when accounts are published, there can be no want of witnesses, nor commentators, nor judges.

Each item is examined. Was this article necessary? did it arise from want, or was it suggested for the purpose of creating expense? Is not the public more dearly served than individuals? has not a preference been given to a contractor at the public expense?

* The most ancient work which I know upon this subject, is entitled *Clavell's* Recantation. The second edition is dated 1628. It is in verse. Clavell was a man of family, who became a highwayman: he obtained a pardon. It is said in the title-page, that the book was published at the express order of the king (Charles I.) One of the more modern is entitled, *A View of Society and Manners in High and Low Life, by Parker.*

Has not a secret advantage been given to a favourite? has nothing been granted to him upon false pretences? Have no manœuvres been practised to prevent competition? Is there nothing concealed in the accounts? There are a hundred questions of the same kind, upon which it is impossible to secure complete explanations, if accounts are not rendered public. In a particular committee, some may want integrity, others knowledge; a mind slow in its operations will pass over what it does not understand, for fear of discovering its inaptitude; a lively spirit will not trouble itself with details; each will leave to others the fatigue of examination. But every thing which is wanting in a small body, will be found in the assembled public: in this heterogeneous and discordant mass, the worst principles will lead to the desired end, as well as the best; envy, hatred, malice, will assume the mask of public spirit; and these passions, because they are more active and persevering, will scrutinize all the parties better, and make even a more scrupulous examination. Hence those who have no other restraint than the desire of human applause, will be retained in the discharge of their duty by the pride of integrity and the fear of shame.

In seeking for exceptions, I have only found two: the first regards the expenses of this publication; the other regards the nature of those services which ought to remain secret. It might be useless to publish the accounts of a small parish, because the books are accessible to all who are interested in their examination; and the publication of the sums destined to secret service, could only be thought of, under the pain of losing all the information you might otherwise obtain respecting the designs of your enemies.

ART. X. — *Establish Standards of Quantity, Weights, and Measures.*

Weights indicate the quantity of matter; measures, the quantity of space. Their utility consists — first, in satisfying each individual as to the quantity of any thing which he wants; secondly, in terminating disputes; thirdly, in preventing frauds.

To establish uniformity in the same state has been the object of many sovereigns. To find a common and universal measure for all people, has been the object of research with many philosophers, and latterly of the French Government—a service truly honourable, since there is hardly any thing more rare and noble, than to see a government labouring upon one of the essential bases of union among mankind.

Uniformity of weights and measures, under the same government, and among a people who, in other respects, have the same language, is a point upon which it would seem that there is no need of much reasoning to show its utility. A measure of which an individual does not know the contents, is useless. If the measures of two towns are not the same, either in name or quantity, the trade between the individuals cannot but be exposed to great mistakes or great difficulties. These two places, in this respect, are strangers one to another. If the nominal price of the goods measured be the same, and the measures are different, the real price is different; continual attention is requisite, and distrust mingles with the course of affairs; errors glide into honest transactions, and fraud hides itself under deceptive denominations.

For the introduction of uniformity, there are two methods:—The first, to make standards, which should have public authority; to send them into every district, and to forbid the use of every other: the second, to make standards, and leave to general convenience the case of their adoption. The first method has been employed in England; the second was practised with success by the Archduke Leopold, in Tuscany.

When a public standard has been provided, a punishment may be imposed upon those who make weights and measures not in conformity to the standards; and then all bargains, which have not been made according to these standards, might be declared null and void. But this last measure would hardly be necessary; the two former would be sufficient.

In different nations, the want of uniformity in this respect cannot produce so many mistakes — the difference of language alone, putting every one upon their guard. Much embarrassment, however, results from it to commerce; and fraud, favoured by mystery, may often avail itself of the ignorance of purchasers.

An inconvenience of less extent, but which is not less important, is felt in medicine. If the weights are not exactly the same, especially with regard to substances of which small quantities are important, the pharmacopœia of one country can with difficulty be employed in another, and may lead to fatal errors. It is also a considerable obstacle to the free communication of the sciences; and the same inconvenience is found in relation to those arts, in which success depends upon the most delicate proportions.

ART. XI. — *Establish Standards of Quality.*

It would require many details to state all that government would have to do, in order to establish the most suitable criteria of the quality and value of a multitude of objects which are susceptible of different proofs. The touchstone is an imperfect proof of the quality and value of metallic compositions mingled with gold and silver: the hydrometer is an unfailing proof, in so far as identity of qua-

lity results from the identity of specific gravity.

The adulterations most important to be known, are those which are hurtful to health; such as the mixture of chalk and burnt bones with flour, in the making of bread; the use of lead in taking off the acidity of wine, or of arsenic in refining it. Chemistry presents the means of discovering all these adulterations; but knowledge is required for their application.

The intervention of government in this regard, may be limited to three points:—1*st*, The encouragement of the discovery of the means of proof, in those cases in which they are still wanting; 2*d*, The dissemination of this knowledge among the people; 3*d*, The prescription of their use by officers appointed for the purpose.

ART. XII.—*Institute Stamps or Marks, to attest the Quantity or Quality of Articles which ought to be made according to a certain Standard.*

Such marks are declarations or certificates in an abridged form. There are five points to be considered in these documents: 1*st*, Their end; 2*d*, The person whose attestation they bear; 3*d*, The extent and the details of the information they contain; 4*th*, The visibility, the intelligibility of the mark; 5*th*, Its permanence, its indestructibility.

The utility of authentic attestations is not doubtful. They are successfully employed for the following objects:—

1. To secure the rights of property. It may be left to the prudence of individuals to use this precaution in what concerns them; but with respect to public property, and objects in deposit, the employment of such marks ought to be regulated by law. It is thus that, in England, stores for the use of the royal navy bear a particular mark, which it is unlawful to employ in the merchant service. In the royal arsenals, an arrow is marked upon the timber used in building; a white thread runs through the cordage, which private persons are forbidden to use.

2. To secure the quality or quantity of commercial articles for the benefit of purchasers. Thus, by statute law in England, marks are placed upon many articles; upon blocks of wood exposed to sale, upon leather, bread, pewter, plate, money, woollen goods, stockings, &c.

3. To secure the payment of taxes. If the article liable to the tax has not the mark in question, it is a proof that the tax has not been paid. The examples are numberless.*

4. To secure obedience to the laws which prohibit importation.

* Chocolate, tea, hops, letters, newspapers, cards, almanacks, hackney-coaches, &c.

CHAPTER XI.

PROBLEM VIII.

To prevent Offences, by giving to many persons an interest in preventing them.

I AM about to cite an example, which might have been referred to the preceding head as well as to this, for it has prevented the offence—it may be, by increasing the difficulty of hiding it—it may be, by giving to more persons an immediate interest in preventing it.

The carriage of post letters in England had always wanted diligence and exactness: the couriers would stop for their pleasure, or their profit: the innkeepers would not urge them forward. All these circumstances were so many little offences or violations of the established rules. What ought the legislature to do to remedy them? Superintendence was fatiguing; punishment was gradually relaxed; informations, always regarded as odious or embarrassing, became rare, and the abuse, suspended for a moment, soon returned to its ordinary course.

A very simple mode was hit upon, which required neither law, nor punishment, nor information, but which was better than all.

This mode consisted in combining two establishments, which had till that time been distinct: the carriage of letters and the conveyance of passengers. The success was complete: the celerity of the post has been doubled, and travellers have been better served. This deserves the trouble of an analysis.

The travellers who accompany the post-office servants, become so many inspectors of their conduct; they cannot escape from their observation. At the same time that they are excited by their praises, and by the reward which they expect from them, they cannot be ignorant that if they lose their time, these travellers have a natural interest in complaining, and that they may become informers, without being paid for the service, or fearing the odium attached to the character. Such are the advantages of this little combination. Evidence secured respecting the slightest faults—the motive of reward substituted for that of punishment—informations and examinations spared—occasions for punishment rendered extremely rare, and the two services rendered by their union more commodious, more prompt, and more economical.

This happy idea of Mr. Palmer is a study in legislation. It is well to reflect on what he has successfully done in this respect, that we may learn to overcome other difficulties. In seeking to develope the cause of this success, we shall rise from particulars to general principles.

CHAPTER XII.

PROBLEM IX.

To facilitate the Recognition and the finding of Individuals.

THE greater number of offences would not be committed, if the delinquents did not hope to remain unknown. Every thing which increases the facility of recognising and finding individuals, adds to the general security.

This is one reason why less is to be feared from those who have a fixed habitation, property, or a family. The danger arises from those who, from their indigence or their independence of all ties, can easily conceal their movements from the eye of justice.

Tables of population, in which are inscribed the dwelling-place, the age, the sex, the profession, the marriage or celibacy of individuals, are the first materials of a good police.

It is proper that the magistrate should be able to demand an account from every suspected person as to his means of living, and consign those to a place of security who have neither an independent revenue, nor other means of support.

There are two things to be observed with regard to this object: That the police ought not to be so minute or vexatious as to expose the subjects to find themselves in fault, or vexed by numerous and difficult regulations. Precautions, which are necessary at certain periods of danger and trouble, ought not to be continued in a period of quietness; as the regimen suited to disease ought not to be followed in a state of health. The second observation is, that care should be taken not to shock the national spirit. One nation would not bear what is borne by another. In the capital of Japan, every one is obliged to have his name upon his dress. This measure might appear useful, indifferent, or tyrannical, according to the current of public prejudices.

Characteristic dresses have a relation to this end. Those which distinguish the different sexes are a means of police as gentle as salutary. Those which serve to distinguish the army, the navy, the clergy, have more than one object; but the principal one is subordination. In the English universities, the pupils wear a particular dress, which restrains them only when they wish to go beyond the prescribed bounds. In charity schools, the scholars wear not only a uniform dress, but even a numbered plate.

It is to be regretted that the proper names of individuals are upon so irregular a footing. Those distinctions, invented in the infancy of society, to provide for the wants of a hamlet, only imperfectly accomplish their object in a great nation. There are many inconveniences attached to this nominal confusion. The greatest of all is, that the indication arising from a name is vague; suspicion is divided among a multitude of persons; and the danger to which innocence is exposed, becomes the security of crime.

In providing a new nomenclature, it ought to be so arranged, that, in a whole nation, every individual should have a proper name, which should belong to him alone. At the present time, the embarrassment which would be produced by the change would perhaps surpass its advantages; but it might be useful to prevent this disorder in a new state.*

There is a common custom among English sailors, of printing their family and christian names upon their wrists, in well-formed and indelible characters; they do it that their bodies may be known in case of shipwreck.

If it were possible that this practice should become universal, it would be a new spring for morality, a new source of power for the laws, an almost infallible precaution against a multitude of offences, especially against every kind of fraud in which confidence is requisite for success. Who are you, with whom I have to deal? The answer to this important question would no longer be liable to evasion.

This means, by its own energy, would become favourable to personal liberty, by permitting relaxations in the rigour of proceedings. Imprisonment, having for its only object the detention of individuals, might become rare, when they were held as it were by an invisible chain.

There are, however, plausible objections to such a practice. In the course of the French revolution, many persons owed their safety to a disguise, which such a mark would have rendered unavailing. Public opinion, in its present state, opposes an insurmountable obstacle to such an institution; but opinion might be changed, by patiently guiding it with skill, and by beginning with great examples. If it were the custom to imprint the titles of the nobility upon their foreheads, these marks would become associated with the ideas of honour and power. In the islands of the South Sea, the women submit to a painful operation, in tracing upon their skin certain figures, to which they annex the idea of beauty. The impression is made by puncturing the skin, and rubbing in coloured powders.

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* The following is a sketch of the general plan. The whole name might contain the following parts:—1. The family name, essential for the identification of the races; 2. A single baptismal name or pre-nomen; 3. The place and the date of birth. This compound denomination should be repeated in all legal affairs. The method of abbreviating it for ordinary use, would depend upon the genius of the language.

CHAPTER XIII.

PROBLEM X.

To increase the Difficulty of Escape for Delinquents.

THESE means depend much upon geographical dispositions — upon natural and artificial barriers. In Russia, the thinness of the population, the asperity of the climate, the difficulty of the communications, give to justice a force which could hardly have been believed to exist in so vast a country.

At Petersburgh and at Riga, a passport cannot be obtained till the intention to depart has been several times announced in the Gazette. This precaution, taken against fraudulent debtors, has greatly increased commercial confidence.

Every thing which increases the communication of intelligence with rapidity, may be referred to this head.

Descriptions are very imperfect and doubtful instruments of recognition; profiles, which may be so easily multiplied at a low price, would be much better: they might be employed either for prisoners whose escape is feared, or for soldiers whose desertion is apprehended, or for any suspected person who may have been denounced to the magistrate, and whom it is desirable to secure, without carrying restraint so far with regard to him as imprisonment.

CHAPTER XIV.

PROBLEM XI.

To diminish Uncertainty with regard to Procedure and Punishment.

IT is not my intention here to enter upon the vast subject of procedure: this will be the object not of a chapter, but of a separate work. The present chapter will be confined to two or three general observations.

Has a crime been committed? it is the interest of society that the magistrate charged with its punishment should be informed of it, and informed in such manner as to authorize the infliction of the punishment incurred. Is it alleged that a crime has been committed? it is the interest of society that the truth or falsehood of this allegation should be made evident. Hence, the rules of evidence, and the forms of procedure, ought to be such as, on one side, to admit all true information, and, on the other, to exclude all false information; that is to say, all that offers more chances of deceiving than enlightening.

Nature has placed before our eyes a model of procedure. When we regard what passes in the domestic tribunal — when we examine the conduct of the father of a family among his children and servants, of whom he is the head — we there discover the original features of justice, which we can hardly recognise after they have been disfigured by men incapable of discerning, or interested in disguising the truth. A good judge is only the father of a family acting upon a larger scale. The methods which are good for the father of a family in his search after truth, are equally good for the judge. This is the first model of procedure; it has been departed from, but it ought never to have been discarded.

It is true, that a confidence may be accorded to the father of a family, which cannot be accorded to a judge, because the last has not the same motives of affection to guide him, and may perhaps be led astray by a personal interest. But this only proves that it is necessary to guard against the partiality or corruption of the judge, by precautions which are not requisite in the domestic tribunal. This does not prove that the forms of procedure, and rules of evidence, ought to be different.

English jurisprudence admits the following maxims: —

1. That no one shall be witness in his own cause.
2. That no one shall accuse himself.
3. That the testimony of a person interested in the cause is not admissible.
4. That hearsay evidence is not admissible.
5. That no one shall be tried twice for the same offence.

It is not my intention here to discuss these rules of evidence. In treating of procedure in general, it will be proper to examine if English jurisprudence, superior in so many respects to that of all other nations, owes that superiority to these maxims, or whether they are not the principal cause of that weakness in the powers of justice, from which arises the feebleness of the police in England, and the frequency of crimes.

I shall only observe, that all precautions which are not absolutely necessary for the protection of innocence, offer a dangerous protection to crime. I know no maxim in procedure more dangerous than that which places justice in opposition to itself — which establishes a kind of incompatibility among its duties. When it is said, for example, that it is better to allow one hundred guilty persons to escape, than to condemn one that is innocent, — this supposes a dilemma which does not exist. The security of the innocent may be complete, without favouring the impunity of crime: it can only be complete upon that condition; for every offender who escapes, menaces the public safety; and to allow of this escape is not to protect innocence, but to expose it to be the victim of a new crime. To absolve a criminal, is to commit by his hands the crimes of which he becomes the author.

The difficulty of prosecuting crimes is one cause of their impunity, and of weakness on the part of justice. When the law is clear — when the judge is appealed to immediately after the commission of the supposed crime, the function of accuser is almost confounded with that of witness. When the offence is committed under the eyes of the judge, only two persons are necessary, so to speak, in the drama — the judge and the offender. It is distance which detaches the function of witness from that of judge. But it may happen, that all the witnesses to a fact cannot be collected together; or that the discovery of the offence may not be made till long after its commission; or that the accused has to allege in his defence, facts which can only be verified in the place where they are said to have happened. All this may require delay. This delay may give rise to new incidents, which may require further delay. The procedure of justice becomes complicated; and in order to follow all this chain of operations, without confusion and without neglect, it becomes requisite to place over these judicial proceedings a person who shall have to conduct them. Hence arises another function, that of accuser. The accuser may be either one of the witnesses, or a person interested in the affair, or an officer expressly appointed for this object.

Judicial functions have often been so divided, that the judge who receives the evidence whilst it is recent, has no right to decide upon it, but must send the affair to another judge, who will only have leisure to attend to it when the proofs are half effaced. There are beforehand established, in most states, many useless formalities, and it has been necessary to create officers to follow up these formalities. The system of procedure is thus rendered so complicated, that it becomes an abstruse science: he who would prosecute an offence is obliged to put it into the hands of an attorney, and the attorney himself cannot proceed without having another man of law, of a superior class, to direct him by his counsels, and to speak for him.

To these disadvantages may be added two others: —

1. Legislators, without thinking that they have placed themselves in opposition to themselves, have often closed the approaches of the tribunals to those who have most need of them, by subjecting procedure to the most objectionable taxes.

2. There is a public dislike attached to all those who employ themselves as public accusers in the execution of the laws. This prejudice is foolish and pernicious, yet legislators have often had the weakness to encourage it, without having made the slightest effort to overcome it.

What is the effect of all this accumulation of delay and discouragement? it is, that the laws are not executed. When a man can at once address the judge, and tell him what he has seen, the expense of this proceeding is a trifle. In proportion as he is obliged to pass by a great number of intermediates, his expenses increase; when to this is added the loss of time, the disgust, the uncertainty of success, one is surprised that men are still found sufficiently resolute to engage in such a pursuit. There are but few, and there would be still fewer, if those who adventure in this lottery knew as well as the lawyers what it would cost, and the number of adverse chances.

These difficulties would vanish on the simple institution of a public accuser, clothed with the character of a magistrate, having the conduct of the prosecution, and chargeable with the expenses. The informers who would require to be paid, need have only a small salary; and a hundred gratuitous informers would present themselves, for one who required to be paid.* Each law put into execution would exhibit its good or bad effects: the good grain would be preserved, and the chaff thrown into the fire. Informers, animated by public spirit, rejecting all pecuniary recompense, would be listened to with the respect and confidence which is their due. Delinquents would no longer be able to withdraw themselves from the punishment they had incurred, by treating with those who have undertaken the prosecution, either by engaging them to desist, or by turning them to their own favour.

It is true, that in England, in every important case, the prosecutor is forbidden to make a compromise with the accused without the permission of the judge; but if this prohibition were universal, what effect would it have in those cases in which it is the interest of both parties to evade it?

CHAPTER XV.

PROBLEM XII.

To prohibit Accessory Offences, in order to prevent their Principals.

THOSE acts which have a connexion with a pernicious event as its cause, may be consi-

* I know by experience, says Sir John Fielding, that for one information brought before me from the desire of reward, I have received ten which had no other motive than the public good. P. 412.

The smallest expense of a prosecution in an ordinary court of justice, is £28 sterling, a sum nearly equal to the subsistence of a common family for a year. How can it be expected that a man, from public spirit, should expose himself to so considerable a sacrifice? independently of the embarrassment of all kinds connected with it. With such a system of procedure, it would be a miracle if the laws had the efficacy of which they are susceptible, if these obstacles were removed,

dered as *accessory* offences in relation to the *principal* offence.

The principal offence being well determined, there may be distinguished as many accessory offences as there are acts which may serve either to prepare or to manifest a projected crime. Now, the more these preparatory acts are distinguished, for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the criminal be not stopped at the first step of his career, he may be at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoitres all the external posts of the enemy, with the intention of stopping his enterprises. He places, in all the defiles, in all the windings of his route, a chain of works, diversified according to circumstances, but connected among themselves, in such manner that the enemy finds in each, new dangers and new obstacles.

If we regard legislators in their practice, we shall not find one who has worked systematically upon this plan, and not one who has not followed it to a certain point.*

Offences against the game-laws have been divided into many accessory offences, according to the nature of the snare, according to the kind of nets or other instruments necessary for taking the game, &c. Smuggling also has been attacked, by prohibiting many preparatory acts. Frauds, with regard to different kinds of coin, have been combated in the same manner.

The following are other examples of what may be done under the head of police: —

Against Homicide and other Corporal Injuries.

Prohibition of purely offensive arms, which are easily hidden. In Holland, it is said that a kind of instrument, shaped like a needle, is made, which is thrown from a tube, which occasions a mortal wound. The manufacture, the sale, the possession of these instruments, might be prohibited as accessaries to murder.

Pocket-pistols, which highway robbers have made use of in England, ought they to be prohibited? The utility of such a prohibition is problematical. Of all methods of robbery, that which is carried on by means of fire-arms is the least dangerous to the person attacked. In such a case, the simple threat is commonly sufficient for the accomplishment of the object. The robber who should pull his trigger after the party had delivered his money, would be guilty not only of useless cruelty, he would disarm himself; instead of which, by reserving his fire, he preserves his means of defence. He who employs a club or a sword, has not the same motive for refraining to strike: the first blow becomes even a reason for a second, that he may put his victim out of a condition to pursue him.

Prohibition of the sale of poisons requires that a catalogue be made of poisonous substances; the sale of them cannot, however, be altogether forbidden;† it can only be regulated and subjected to precautions requiring that the seller should know the purchaser, that he should have witnesses of the sale, that he should register the sale in a separate book, &c. These regulations, to be complete, would require considerable details. Would the advantages compensate for the trouble? This will depend upon the manners and habits of the people. If poisoning be a frequent crime, it will be necessary to take indirect precautions against it. They would have been proper in ancient Rome.

Accessory offences may be distinguished into four classes: — The first class implies an intention formed to complete the principal offence. Offences of this class may be comprised under the general name of attempts or preparations.‡

The second class does not suppose that the intention to commit the crime is actually formed, but that the individual is placed in a situation in which he will form the design for the future. Gaming, prodigality, idleness when joined with indigence, are offences of this class. Cruelty towards animals is the road to cruelty towards men, &c.

The third implies no criminality, either actual, intentional, or probable, but only possible, from accident. These kinds of offences are created, when police regulations are made which have for their object the prevention of calamities — when, for example, the sale of certain poisons, of gunpowder, &c. is forbidden. The violation of these regulations, separate from all criminal intention, is an offence of this third class.

The fourth class is composed of presumed offences; that is to say, of acts that are considered as proofs of an offence (evidentiary offences;) acts hurtful or not hurtful in themselves, furnishing presumptions of an offence having been committed. By an English sta-

* In the Code Theresa, under each head of offences, there is a head of *indicia*. These indications are distinguished into two classes: *indicia ad capturam; indicia ad torturam:* those which suffice to justify an arrest; those which suffice to justify the torture—a practice which was not yet abolished.

† Every active medicine, taken in a certain dose, is a poison.

‡ A soldier, in a review, puts a ball into his musket; it is discovered before the order to fire is given: this may be regarded as a preparatory act: if he had fired at a person or an assemblage of persons, this would have been an attempt — if he had killed any one, he would have committed the crime known under the name of homicide.

tute, a certain conduct on the part of a woman was directed to be punished as murder, because it was supposed that such conduct was a sure proof of infanticide. By another statute, it is made a capital crime for bands of men to go about armed in disguise, because this is considered a proof of a design to commit murder, in protecting smugglers from justice. By another statute, the possession of stolen goods, without being able to give a satisfactory account of the manner in which they were acquired, is made an offence, this circumstance being considered a proof of complicity. Again, by another statute, the obliteration of the marks upon shipwrecked effects is made an offence, this being considered a proof of an intention to steal them.

These offences, founded upon these presumptions, suppose two things:—1. Mistrust in the system of procedure; 2. Mistrust in the wisdom of the judge. In England, the legislature has thought that juries, being too much disposed to pardon, would not see in these circumstances a certain proof of a crime; and it has made the act itself, which furnishes the presumption, a separate offence—an offence independent of every other. In a country in which the tribunals should possess the entire confidence of the legislature, these acts would be placed under the head to which they belong, and would be considered as presumptions, the judge being allowed to draw from them his conclusions.

With respect to accessory offences, it is essential that the legislator should possess three rules by way of *memento*:—

1. For each principal offence which he creates, he ought to extend his prohibition to the preparatory acts; to simple attempts, generally under the sanction of a less punishment than is appointed for the principal offence. This is the general rule, and the exceptions ought to be founded upon particular reasons.

2. He ought, then, under the description of the principal offence, to place all the accessory, preliminary, and concomitant offences, which are susceptible of a specific and precise description.

3. In the description of accessory offences, he should take care not to impose too much restraint—not to trespass upon the liberty of individuals, so as to expose innocence to danger by his precipitate conclusions. The description of an offence of this kind is almost always dangerous, if it do not include a clause allowing the judge to estimate the degree of presumption which ought to be drawn from it. In this case, to create an accessory offence is almost the same thing as suggesting the fact in question to the judge, by way of instruction, under the character of an indicative circumstance, and not allowing him to draw any conclusion from it, if he see any special reason for regarding the indication as inconclusive.

If the punishment for an attempt, or preliminary offence, be equal to that of the crime, when completed, without making allowance for the possibility of repentance or prudential desisting, the offender, seeing himself exposed to the same punishment for the simple attempt, will see at the same time that he is at liberty to complete it without incurring any more danger.

CHAPTER XVI.

OF THE CULTIVATION OF BENEVOLENCE.

THE principle of benevolence is in itself distinct from the love of reputation. Each of these may act without the other. The first may be a feeling of instinct, a gift of nature; but it is in great measure the produce of cultivation, the fruit of education. For where will be found the greater measure of benevolence—among the English or among the Iroquois—in the infancy of society or at its maturity? If the feeling of benevolence be susceptible of augmentation, which cannot be doubted, it must be by the assistance of that other principle of the human heart, the love of reputation. When a moralist paints benevolence under the most amiable characters, and selfishness and hardness of heart in the most hateful colours, what does he do? He seeks to unite to the purely social principle of benevolence, the demi-personal and demi-social principle of the love of reputation; he seeks to combine them, and give them the same direction—to arm the one by the other. If these efforts are successful, which of the two principles deserves the praise? neither the one nor the other exclusively, but their reciprocal concurrence—the love of benevolence as the immediate cause; the love of reputation as the remote cause. A man who yields with pleasure to the soft accents of the social principle, neither knows, nor desires to know, that it is a less noble principle which has given them their first tone. There is a disdainful delicacy in the better element of our nature, which wishes to owe its origin only to itself, and blushes at all foreign association.

1. To increase the force of the feelings of benevolence; 2. To regulate their application according to the principle of utility: such ought to be the two objects of the legislator.

1. Would he inspire the citizens with humanity? he should set them the first example; he should show not only the greatest respect for human life, but for all circumstances influencing sensibility. Sanguinary laws have a tendency to render men cruel, either from fear, from imitation, or from revenge; laws

dictated by a spirit of gentleness, humanize a nation, and the spirit of the government will be found in its families.

The legislator ought to interdict every thing which may serve to lead to cruelty. The barbarous spectacles of gladiators, introduced at Rome during the latter times of the republic, without doubt contributed to give the Romans that ferocity which they displayed in their civil wars. A people accustomed to despise human life in their games, could not be expected to respect it amid the fury of their passions.

It is proper, for the same reason, to forbid every kind of cruelty exercised towards animals, whether by way of amusement, or to gratify gluttony. Cock-fights, bull-baiting, hunting hares and foxes, fishing and other amusements of the same kind, necessarily suppose either the absence of reflection, or a fund of inhumanity, since they produce the most acute sufferings to sensible beings, and the most painful and lingering death of which we can form any idea. It ought to be lawful to kill animals, but not to torment them. Death, by artificial means, may be made less painful than natural death: the methods of accomplishing this deserve to be studied and made an object of police. Why should the law refuse its protection to any sensitive being? The time will come, when humanity will extend its mantle over every thing which breathes. We have begun by attending to the condition of slaves; we shall finish by softening that of all the animals which assist our labours or supply our wants.

I know not if the Chinese legislators, in instituting their minute ceremonial, designed to cultivate benevolence, or only to maintain peace and subordination. Politeness in China is a sort of worship—a ritual, which is the great object of education, and the principal science. The exterior movements of this great people, always regulated, always prescribed by etiquette, are almost as uniform as those of a regiment which repeats its exercise. This pantomine of benevolence may be as destitute of reality, as a devotion charged with trifling practices may be separated from morality. So much restraint seems ill to accord with the movements of the human heart; and these exhibitions at command, do not confer any obligation, because they possess no merit.

There exist some principles of antipathy, which are sometimes interwoven with the political constitutions of states, which it is difficult to extirpate. Such are religious enmities, which excite their partisans to hate and persecute each other; hereditary revenges between powerful families; privileged conditions, which form insurmountable barriers among the citizens—the consequences of conquests; when the conquerors have never become incorporated with and mingled with the conquered; animosities founded upon ancient injustice; government factions, which rise with victory and fall upon defeat. In these unfortunate states, hearts are more frequently united by the wants of hatred than of love. To render them benevolent, it is necessary to relieve them from fear and oppression.

The destruction of those prejudices which render men enemies, is one of the greatest services which can be rendered to morality.

The travels of Mungo Park in Africa have represented the negroes under the most interesting point of view: their simplicity, the strength of their domestic affections, the picture of their innocent manners, has increased the public interest in their favour.

Satirists weaken this sentiment. When any one has read Voltaire, does he feel disposed to favour the Jews? Had he possessed more benevolence with respect to them, by exposing the degradation in which they are held, he would have explained the less favourable points of their character, and have exhibited the remedy by the side of the disease.

The greatest attack upon benevolence has been made by religious exclusionists; by those who have incommunicable rites; by those who breathe intolerance, and represent all unbelievers as infidels and enemies of God.

In England, the art of exciting benevolence by the publicity given to its exhibition, is better understood than anywhere besides. Is it desired to undertake any scheme of benevolence—a charity which requires the concurrence of numbers? a committee is formed of its most active and distinguished supporters; the amount of the contributions is announced in the public papers; the names of the subscribers are printed there day by day. This publication serves many purposes: its immediate object is to guarantee the receipt and employment of the funds; but it is a feast for vanity, by which benevolence profits.

In these establishments of charity, the annual subscribers are called governors; the superintendence which they exercise, the little state which they form, interests them in promoting their welfare; individuals like to trace the good which has been done, to enjoy the power which is conferred; the benefactors are brought near to the parties relieved, and these being placed in view, strengthen benevolence, which cools when its object is removed to a distance, but is warmed by its presence.

There are more of these associations of benevolence in London, than there are convents in Paris.

Many of these charities have particular objects; the blind, the dumb, the lame, orphans, widows, sailors, the children of the clergy, &c. Every individual is touched with one kind of misery, more than by another; his

sympathy is always affected by some personal circumstance: there is art, therefore, in diversifying these charities, in separating them into different branches which apply to every kind of sensibility, so that none of them are lost.

It is surprising that more draughts have not been made upon this disposition from among females, among whom the sentiment of pity is stronger than among men. There are two institutions in France, well adapted to this end: the Daughters of Charity, who devote themselves to the service of the hospitals; and the Maternal Society, formed by the ladies in Paris, who visit poor women in the time of their confinement, and take care of the first days of infancy.

2. The feelings of benevolence are liable to be led astray from the principle of general utility. This can only be prevented by instruction: they cannot be commanded; they cannot be forced: they can only be persuaded and enlightened. Men are brought by little and little to distingish the different degrees of utility; to proportion their benevolence to the extent of its object. The finest model is drawn by Fenelon in that saying, in which he has so well painted his own heart: — "I prefer my family to myself, my country to my family, and the human race to my country."

The objects sought in these public instructions should be, to direct the affections of the citizens to this object; to repress the wanderings of benevolence; to make them feel their own interest in the general interest; to make them ashamed of that spirit of family—of that *esprit de corps* which militates against the love of country— of that unjust love of country which turns to hatred against other nations; to divert them from the exercise of unfounded pity towards deserters, smugglers, and other persons who offend against the government; to disabuse them of the false notion that there is humanity in favouring the escape of the guilty—in procuring impunity for crime — in encouraging mendicity, to the prejudice of industry; to seek to give to all these sentiments the proportion most advantageous for all, by showing the danger and littleness of the caprices, the antipathies, and momentary attachments which turn the balance against general utility and permanent interests.

The more we become enlightened, the more benevolent shall we become; because we shall see that the interests of men coincide upon more points than they oppose each other. In commerce, ignorant nations have treated each other as rivals, who could only rise upon the ruins of one another. The work of Adam Smith is a treatise upon universal benevolence, because it has shown that commerce is equally advantageous for all nations—each one profiting in a different manner, according to its natural means; that nations are associates and not rivals in the grand social enterprise.

CHAPTER XVII.

EMPLOYMENT OF THE MOTIVE OF HONOUR, OR OF THE POPULAR SANCTION.

To increase the strength of this power—to regulate its application: such are the two objects to be accomplished.

The strength of public opinion is in combined proportion to its extent and intensity: its extent is measured by the number of suffrages; its intensity by the degree of its blame or approbation.

For increasing the power of opinion in extent, there are many methods: the principal are, the liberty of the press, and the publicity of all acts which interest the nation — publicity of the tribunals, publicity of accounts, and publicity of the debates upon state affairs, when secresy is not required by some particular reason. The enlightened public — the depository of the laws and archives of honour, the administrator of the moral sanction, forms a supreme tribunal which decides upon all causes and all persons. By the publicity of affairs, this tribunal is in a condition to collect the proofs, and to judge — by the liberty of the press, to pronounce and to execute its judgment.

For increasing the power of opinion in intensity, there are also a diversity of methods, either by punishments which possess a certain character of ignominy, or by rewards which have for their principal object the investing with honour those who receive them.

There is a secret art of governing opinion, so that it shall not perceive, so to speak, the manner in which it is led. It consists in so disposing matters, that the act to be prevented cannot be performed, without also performing an act which popular opinion has already condemned.

Is a tax to be paid? according to the circumstances of the case, an oath, or a certificate, may be required, that it is correctly paid.

To take a false oath, to fabricate a false certificate, are offences which the public is prepared beforehand to mark with the seal of its condemnation, whenever there shall be occasion for it. This, then, is a sure method of rendering infamous an offence, which, without its accessary, can never exist.*

* The following anecdote is related on good authority. There was a riot at Madrid, under Charles III., occasioned by the prohibition against wearing round hats. This prohibition was not a matter of caprice. The large and slouched hats prohibited, served, when a cloak

Sometimes a simple change in the *name* of the objects suffices to change the sentiments of men. The Romans abhorred the name of *king*, but they suffered those of *dictator* and *emperor*. Cromwell would not have been able to place himself upon the throne of England; but he possessed, under the title of *protector*, an authority more unlimited than that of the king. Peter I. abdicated the title of despot for himself, and he directed that the slaves of the nobles should only be called subjects.

If the people were philosophers, this expedient would be worth nothing; but upon this point, philosophers are only men. How much deception is there in the words *liberty* and *equality!* What contradictions between that *luxury* which all the world condemns, and that *prosperity* which all the world admires!

The legislator should take care not to furnish arms to public opinion in those cases in which he finds it opposed to the principle of utility. For this reason, he ought to efface from the laws all remains of the pretended crimes of heresy and sorcery, that there may be no legal foundation for these superstitious ideas. If he dare not wound an error too widely extended, he ought at least not to give it a new sanction.

It is very difficult to employ the motive of honour in engaging the citizens in the service of the law against delinquents. Pecuniary rewards granted for informations have failed in their object: the desire of gain has been opposed by that of shame; the law, instead of gaining strength by offering a reward disapproved by public opinion, has been weakened. Individuals have been suspected of acting from a degrading motive. The ill-chosen reward, instead of attracting, has repulsed, and deprived the law of more gratuitous protectors, than it has procured for it mercenary servants.

The most powerful method of producing an important revolution in public opinion is to strike the mind of the people by some noble example. Thus Peter the Great, by passing gradually through all the gradations of the public service, taught his nobility to bear the yoke of military subordination. Thus Catherine II. surmounted the popular prejudice against inoculation, not by trying it upon some criminals, as was done in the reign of Queen Anne, but by submitting to it herself.

was thrown over the shoulders, completely to conceal the person. Under this disguise, a thief or an assassin could strike his blow, and never be recognised. The prohibition was therefore proper, but no preparation had been made for it: it wounded a general custom — it appeared to be an attack upon liberty. The people assembled round the palace; the guards wished to repulse them; the tumult became violent; blood was shed; the court was intimidated, and left Madrid, and the Minister was obliged to give way. A short time after this triumph of the round hats, the Count d'Aranda being made Minister, he enjoined all the executioners, in all the towns of Spain, to wear round hats. In a fortnight, no more round hats were seen. This is an example of indirect legislation, which may be referred to this head.

CHAPTER XVIII.

OF THE EMPLOYMENT OF THE RELIGIOUS SANCTION.

THE cultivation of religion has two objects: to increase the force of this sanction; to give to this force a suitable direction. If this direction be bad, it is evident that the less force this sanction possesses, the less evil it will do. With regard to religion, the first thing, therefore, is to examine into this direction: the increase of its force is only a secondary object.

Its direction ought to be conformable to utility. As a sanction, it is composed of rewards and punishments. Its punishments should be attached to actions hurtful to society, and to these actions exclusively: its rewards ought to be promised to actions whose tendency is advantageous to society, and to no others. Such is the fundamental dogma.

The only method of judging of its direction is to consider it solely with relation to the welfare of political society. Every thing besides this is indifferent; and every thing in religious belief which is indifferent, is liable to become pernicious.

But every article of faith is necessarily hurtful, so soon as the legislator, in order to favour its adoption, employs coercive or penal motives. The persons whom he seeks to influence may be considered as forming three classes: those who already are of the same opinion with the legislator; those who reject this opinion; those who neither adopt nor reject it.

With regard to the conformists, the law is not necessary: with regard to the nonconformists, it is useless: by the supposition itself, it does not accomplish its object.

When a man has formed his opinion, is it in the power of punishment to make him change it? The question appears ridiculous. Punishments tend rather to an opposite result: they tend rather to confirm him in his opinion, than to make him give it up; partly because the employment of force is a tacit avowal that reasons are wanting — partly because recourse to violent measures produces aversion to the opinions which it is sought to maintain in this manner. All that can be obtained by punishments is, not to engage a man to *believe*, but to *declare* that he believes.

Those who, from conviction or honour, refuse to make this declaration, undergo the evil of the punishment—the persecution: for what is called *persecution*, is an evil which is not compensated for by any advantage—an evil in pure waste; and this evil inflicted by the hand of the magistrate is precisely the same in kind, but much stronger in degree, than if it had been inflicted by an ordinary malefactor.

Those who, less strong or less noble, escape by a false declaration, give way to the threats, to the danger which immediately presses upon them; but the momentary pain which is avoided, is converted, as to them, into pains of conscience, if they have any scruples, and into pains of contempt on the part of society, which charges with baseness these hypocritical recantations. In this state of things, what happens? One part of the citizens must accustom itself to despise the opinions of the other, in order to be at peace with themselves. They employ themselves in making subtle distinctions between innocent and criminal falsehood; in establishing privileged lies, because they serve as a protection against tyranny; in establishing customary perjuries, false subscriptions, and consider them as *articles of peace*. In the midst of these subtleties, regard for truth is neglected, the limits of right and wrong are confounded, a train of less pardonable falsehoods is introduced under favour of the first—the tribunal of public opinion is divided: the judges who compose it are not guided by the same laws; they no longer know clearly what degree of dissimulation they ought to condemn, nor what they ought to excuse; its voice is drowned in contradictions; and the moral sanction, having no longer an uniform regulator, is weakened and depraved. Thus the legislator, who requires declarations of faith, becomes the corrupter of his country. He sacrifices virtue to religion, instead of making religion an auxiliary to virtue.

The third class to be examined is that of those who, at the establishment of the penal law, had not yet formed any opinion either for or against. With respect to these, it is probable that the law will influence the formation of their opinion. Seeing danger on one side, and security on the other, it is natural that they should regard the arguments of the condemned opinion with a degree of fear and aversion, which they will not feel for the arguments of the favoured opinion. The arguments which they wish to find true, will make a more lively impression than those which they wish to find false: and by this means, a man may come to believe, or rather not to reject, not to misbelieve, a proposition which he would not have adopted if his inclination had been left free. In this last case, the evil is less than in the two former cases, but does not cease to be an evil. It may happen, but it does not always happen, that the judgment gives way entirely to the affections; but even when that happens, that is to say, when the persuasion is as strong as it can be, if fear form any part of the motives of this persuasion, the mind is never perfectly tranquil: what is believed to-day, it is feared may not be believed on the morrow. A clear moral truth is never doubtful, but the belief of a dogma is always more or less shifting. Hence arises irritation against those who attack it. Examination and discussion is dreaded, because we do not feel ourselves placed upon solid ground. It is not necessary to pull down anything in a building which is firmly put together. The understanding becomes weakened; the mind seeks only complete repose in a kind of blind credulity; it seeks out all the errors which possess affinity with its own; it fears clearly to explain itself upon what is possible and impossible, and wishes to confound all boundaries. It loves to entertain sophistry, and every thing which fetters the human mind, every thing which would persuade it that it cannot reason with entire certainty. It acquires an unhappy dexterity in rejecting evidence—in giving force to half proofs—in listening only to one side—in subtilizing against reason. In a word, under this system, it is proper to put a bandage over the eyes, that they may not be wounded by the brightness of day.

Hence, every penal method employed for increasing the force of the religious sanction, acts indirectly against that essential part of good manners, which consists in respect for truth, and respect for public opinion. All the enlightened friends of religion now think the same. There are, however, but few nations which have acted upon this principle. Violent persecutions have ceased, but there still exist secret persecutions, civil punishments, political incapacities, threatening laws, a precarious toleration—a humiliating situation for classes of men who owe their tranquillity only to a tacit indulgence, a continual pardon.

In order to obtain clear ideas as to the advantage which the legislator may derive from increasing the force of the religious sanction, it is necessary to distinguish three cases: 1. Those in which it is entirely subordinated to him; 2. Those in which others partake of this influence with him; 3. Those in which it depends upon a stranger. In this latter case, the sovereignty is really divided between two magistrates—the spiritual (as it is commonly called) and the temporal. The temporal magistrate will be in constant danger of seeing his authority contested or destroyed by that of his rival, and what he should do for increasing the force of the re-

ligious sanction, might prove a diminution of his own power: whilst as to the effects which might result from such a state of strife, they may be found on the tables of history. The temporal magistrate commands his subjects to perform one action; the spiritual magistrate prohibits it: whichever they obey, they are punished by the one or the other; proscribed or damned, they are placed between the fear of the civil sword, and the fear of eternal fire.

In Protestant countries, the clergy are essentially subordinate to the political power: their dogmas do not depend upon the prince; but those who interpret them, depend upon him. But the right of interpreting these dogmas is little less than the same thing as the right of making them. Hence, in Protestant countries, religion is more easily modelled upon the plan of the political authority. Married priests are more completely citizens; they do not form a phalanx among themselves, which can become formidable; they have neither the power of the confessional, nor that of absolution.

But in considering facts alone, whether in Protestant or Catholic countries, it must be acknowledged that religion has played too great a part in the miseries of nations. It appears to have been more often the enemy, rather than the instrument of civil government. The moral sanction has never more force than when it accords with utility; but, unfortunately, the religious sanction seems to have had most force in those cases in which it was most opposed to utility. The inefficacy of religion, when applied to the promotion of political good, is the constant subject of the declamations of those who have the greatest interest in exaggerating its good effects. Too little powerful for the production of good, it has often been too powerful in the production of evil. It was the moral sanction which animated Codrus, Regulus, Russell, and Sidney: it was the religious sanction which worked in Philip II. the scourge of the Low Countries; in bloody Mary of England; and in Charles IX., the executioner of France.

The ordinary solution of this difficulty is to attribute all the good to *religion*, and all the evil to superstition. But this distinction, in this sense, is purely verbal. The thing itself is not changed, because the name is changed, and it is called religion in the one case, and superstition in the other. The motive which acts upon the mind, in both the cases, is precisely the same: it is always the fear of evil and the hope of good from an Almighty Being, respecting whom different ideas have been formed. Hence, in speaking of the conduct of the same man on the same occasion, some will attribute it to religion, and others to superstition.

Another observation, as trivial as the first, and as weak as trivial, is, that it is unjust to argue against the *use* of any thing from its *abuse*, and that the best instruments are those which do the most evil when they are misused. The futility of this argument is easily pointed out. The good effects of a thing are called its use, the bad effects are called its abuse. To say that you ought not to argue against the use from the abuse, is to say that in making a just appreciation of the tendency of a cause, you ought only to regard the good it occasions, and not to consider the evil. Instruments of good, ill employed, may often become instruments of evil: this is true, but the principal character in the perfection of an instrument is, not to be liable to be ill employed. The most efficacious ingredients in medicine are convertible into poisons, I allow; but those which are dangerous are not so good upon the whole as those which render the same service, if such there be, without being liable to the same inconveniences: mercury and opium are very useful; bread and water are still more so.

I speak without circumlocution, and with entire freedom. I have elsewhere explained myself upon the utility of religion; but I must not omit to observe here, that it tends more and more to disengage itself from futile and pernicious dogmas, and to coincide with sound morality and sound policy. Irreligion, on the contrary, (I refuse to pronounce the word atheism) has manifested itself in our days under the most hideous forms of absurdity, immorality, and persecution. This experience is sufficient to show to all good minds in what direction they should exert their efforts. But if government act too openly in favour of this direction, it will fail in its object. It is freedom of inquiry which has corrected the errors of the ages of ignorance, and restored religion to its right direction: freedom of inquiry will continue still to purify it, and to reconcile it with public utility.

This is not the place to examine all the services which religion may render, either as a source of consolation under the ills which man is heir to; or as a moral teaching, best adapted to the most numerous class of society; or as a means of exciting beneficence,* and of producing useful acts of self-devotion, which could not be obtained upon purely human motives.

* Care ought to be taken not to encourage that spirit of foundations and alms, which has too frequently arisen from the vulgar notions of Christianity. They increase the number of the poor, more than they relieve them. Such are the convents of the monks, and their daily distributions in Spain and Italy, which create a numerous class of beggars, and are equivalent to a law, whereby industry is taxed in favour of idleness.

The principal use of religion, in civil and penal legislation, is the giving a new degree of force to an *oath* — another foundation for confidence.

An oath includes two different bonds — the religious and the moral: the one obligatory upon all; the other only upon those who think in a certain manner. The same formulary which professes to expose a man, in case of perjury, to religious punishments, exposes him in the same case to legal punishments and the contempt of men. The religious bond is the most striking; but the greatest part of the force of an oath depends upon the moral bond: the influence of the first is partial; that of the second is universal. It would be, therefore, highly imprudent to employ the one, and neglect the other.

There are some cases in which an oath is of the greatest force: when it operates in concert with public opinion—when it has the support of the popular sanction. There are cases in which it has no force at all: when public opinion acts in opposition to it, or only does not second it. Such are custom-house oaths, and those which are required of the students in certain universities.

It is the interest of the legislator, no less than that of a military chief, to know the true state of the forces under his command. To shun the examination of a weak point, because the appearance of this weak part will not yield satisfaction, would be pusillanimity. But if the weakness of the religious bond in an oath has been thus laid open, it is the fault of the professors of religion: the abuse which they have made of it by lavishing it without measure, has robbed it of the efficacy which it possessed of itself, separated from the sanction of honour.

The force of an oath is necessarily weakened when it turns upon matters of belief, upon opinions: Why? because it is impossible to detect the perjury, and also because human reason, always fluctuating, always subject to variation, cannot pledge itself for the future. Can I be certain that my belief of to-day will remain the same ten years hence? All such oaths are a monopoly bestowed upon men with consciences of little scrupulosity, in opposition to those who possess consciences of more sensibility.

Oaths are degraded when they regard trifles, when they are employed upon occasions in which they will be violated by a kind of universal convention; and more especially when they are required in cases in which justice and humanity will make an excuse for, and almost a merit of, their violation.

The human mind, which always resists tyranny, confusedly perceives that God, on account of his perfections, cannot ratify frivolous or unjust laws. Indeed man, by imposing an oath, would exercise authority over God himself. Man ordains a punishment, and it is for the Supreme Judge to execute it: deny this position, and the religious force of an oath vanishes.

It is very astonishing that in England, among a nation otherwise prudent and religious, this great security has been almost destroyed by the trivial and indecent use which has been made of it.

To show to what an extent habit may deprave moral opinions in certain respects, I quote a passage extracted from Lord Kames, a judge of the Court of Session in Scotland, upon education: —*

"Custom-house oaths now-a-days go for nothing, not that the world grow more wicked, but because no person lays any stress upon them. The duty on French wine is the same in Scotland and in England. But as we cannot afford to pay this high duty, the permission underhand to pay Spanish duty for French wine, is found more beneficial to the revenue, than the rigour of the law. The oath, however, must be taken, that the wine we import is Spanish, to entitle us to the ease of the Spanish duty. Such oaths at first were highly criminal, because directly a fraud against the public: but now that the oath is only exacted for form sake, without any faith being intended to be given or received, it becomes very little different from saying in the way of civility, '*I am, sir, your friend, or your obedient servant.*' And, in fact, we every day see merchants dealing in such oaths, whom no man scruples to rely upon in the most material affairs."

Who would believe that this is the language of a moralist and a judge? The Quakers have raised their simple asseveration to the dignity of an oath; — a magistrate degrades an oath to the simple formula of a ceremony. The oath implies neither faith given, nor faith received. Why then require it? why take it? why this farce? Is religion, then, the last of objects? and if it be thus to be contemned, why should it be so dearly paid for? How great the absurdity of paying a religious establishment for preaching up the importance of an oath, and having judges and legislators who amuse themselves with destroying it! †

CHAPTER XIX.

USES TO BE DRAWN FROM THE POWER OF INSTRUCTION.

INSTRUCTION does not form a separate head, but the above title is convenient as a cen-

* Loose Hints on Education, p. 362.

† By an Act of William IV., the Treasury are authorized to dispense with all oaths which they do not consider necessary in the collection of the revenue, and to substitute declarations as to the acts in their stead.

tre, around which to collect sundry scattered ideas.

Government ought not to do every thing by force: by this it can only move the bodies of men; by its wisdom it extends its empire over their minds: when it commands, it gives its subjects a factitious interest in obedience; when it enlightens, it gives them an internal motive, which cannot be weakened. The best method of instruction is simply to publish facts; but it is sometimes proper to assist the public in forming its judgment upon those facts.

When we see government measures, which are excellent in themselves, fail from the opposition of an ignorant people, we at first feel irritated against the senseless multitude; but when we come to reflect—when we observe that this opposition might have been easily foreseen, and that the government, in proud exercise of authority, has taken no steps to prepare the minds of the people, to dissipate their prejudices, to conciliate their confidence, —our indignation is transferred from the ignorant and deceived people, to its disdainful and despotic leaders.

Experience has shown, contrary to general expectation, that newspapers are one of the best means of directing opinion—of quieting feverish movements—of causing the lies and artificial rumours, by which the enemies of the state may attempt to carry on their evil designs, to vanish. In these public papers, instruction may descend from the government to the people, or ascend from the people to the government: the greater the freedom allowed, the more correctly may a judgment be formed upon the course of opinion—with so much the greater certainty will it act.

Rightly to estimate their utility, it is necessary to refer to the times when public papers did not exist, and consider the scenes of imposture, both political and religious, which were played off with success in countries where the people could not read. The last of these grand impostors with a royal mantle, was Pugatcheff. Would it have been possible in our days to have supported this personage in France or in England? The cheat would have been discovered as soon as announced. These are crimes which are not attempted among enlightened nations—the facility of detecting impostors preventing their birth.

There are many other snares against which governments may guard the people by public instruction. How many are the frauds practised in commerce, in the arts, in the price and quality of goods, which it would be easy to cause to cease by unveiling them! How many dangerous remedies, or rather real poisons, are sold with impudence by empirics, as marvellous secrets, of which it would be easy to disabuse the minds of the most credulous, by publishing their composition!—How many mischievous opinions, how many dangerous or absurd errors, might be stopped in their birth, by enlightening the public! When the folly of animal magnetism, after having seduced the idle societies of Paris, began to spread throughout Europe, one report of the Academy of Sciences, by the force of truth alone, precipitated Mesmer into the crowd of despicable charlatans, and left him no other disciples than incurable fools, whose admiration served to complete his disgrace. Would you cure an ignorant and superstitious people? send into their towns and villages, in quality of missionaries, jugglers, workers of prodigies, who shall begin by astonishing the people, by producing the most singular phenomena, and shall finish by explaining them. The more we know of natural magic, the less shall we be the dupes of magicians. It were to be wished that, with certain precautions, the miracle of St. Januarius at Naples were repeated in all public places, and that it were made a toy for children.

The principal instruction which governments owe to the people, regards the knowledge of the laws. How can these be obeyed, if they are unknown? how can they be known, if they are not published in the simplest form—in such manner that each individual may find for himself what ought to regulate his conduct?

The legislator might influence public opinion by composing a code of political morality analogous to the code of laws, and divided, in the same manner, into a general and particular code. The most delicate questions relative to every profession might there be explained: he need not confine himself to cold lessons, but by mingling with them well chosen historical anecdotes, such a code might be made a manual of amusement for all ages.

To compose such codes would be, so to speak, to dictate the judgments which public opinion ought to pronounce upon the different questions of morals and politics. To these codes might, with the same intention, be added a collection of popular prejudices, with the considerations which might serve as their antidotes.

If ever sovereign power showed itself with dignity among men, it was in the Instructions which were published by Catherine II. for a code of laws. When this unique example is considered for a moment, and it is separated from the recollection of an ambitious government, it is impossible to see, without admiration, a woman descend from the car of victory for the purpose of civilizing so many semi-barbarous nations, and of presenting to them the noblest maxims of philosophy, sanctioned by the touch of the sceptre. Superior to the vanity of herself composing this work, she borrowed whatever was excellent from

the writings of the sages of the time; but by adding to their works the sanction of her authority, she did more for them than they had done for her. She seemed to say to her subjects — "You owe me so much the more confidence, since I have called to my counsels the noblest geniuses of my time. I fear not thus to associate with me these masters of truth and virtue, since they will make me ashamed before the universe if I dare to disgrace them." She was seen, animated with the same spirit, sharing with her courtiers the labours of legislation; and if she were often found in contradiction to herself, like Tiberius, who was fatigued with the servitude of the senate, and would have punished a movement of liberty, yet these solemn engagements, contracted in the face of the whole world, were as barriers which she had imposed upon her own power, and which she rarely ventured to break.

CHAPTER XX.

USE TO BE MADE OF THE POWER OF EDUCATION.

EDUCATION is only government acting by means of the domestic magistrate.

The analogies between a family and a kingdom are of a kind which are obvious at the first glance. The differences are less striking, but it is not less useful to indicate them: —

1. Domestic government may be more active, more vigilant, more occupied with details, than civil government. Without continued attention, families could not subsist.

Civil authority has nothing better to trust to than a reliance upon the prudence of individuals in the conduct of their personal interests. But the head of a family must continually supply the inexperience of those committed to his care.

It is here that censorship may be exercised; a policy which we have condemned in civil governments. Domestic government may keep, from those subject to it, knowledge which might become hurtful to them: it may watch over their connexions and their reading; it may accelerate or retard the progress of their knowledge, according to circumstances.

2. This continued exercise of power, which would be subject to so many abuses in a state, is much less subject to them in the interior of a family: indeed, the father or the mother have for their children a natural affection, much stronger than that of the civil magistrate for the persons who are subordinate to him. Indulgence is in them the most frequent movement in nature; severity is only the result of reflexion.

3. Domestic government may employ punishment in many circumstances, in which civil authority could not. The head of a family knows individuals; the legislator knows only the species. The one proceeds upon certainties, the other upon presumptions. A certain astronomer may perhaps be capable of solving the problem of the longitude: can the civil magistrate know this? ought he to direct him to solve it, and to punish him if he do not? But the private tutor may know if his pupil understand an elementary problem in geometry — that obstinacy has put on the mask of impotence. The tutor can scarcely be deceived; the magistrate necessarily would be so.

In the same manner, there are many vices which the public magistrate cannot repress, because it would require the establishment of offices of detection in every family. The private magistrate, having under his eyes, under his hands, those whom he is charged to conduct, may stop in their origin those vices which the laws can only punish in their last excess.

4. It is especially in the power of rewarding, that these two governments differ. All the wants, all the amusements of youth, may be clothed with a remuneratory character, according to the manner in which they are bestowed, upon certain conditions, after certain work is done. In the island of Minorca, the subsistence of the young boys is made dependent upon their skill with the bow. The honour of suffering in public was, among the Lacedemonians, one of the prizes for virtue among the youthful warriors. There is no government so rich as to do much by rewards: there is no father so poor as not to possess an inexhaustible store of them.

It is especially in youth, that season of lively and durable impressions, that the legislator ought to keep in view the directing of the course of the inclinations towards those things which are most conformable to the public interest.

In Russia, the young nobility have been seen engaged in the public service by means as powerful as they were well imagined. There have arisen, perhaps, fewer good effects as respects military spirit, than as respects civil life. They have been accustomed to order, to vigilance, to subordination. It has obliged them to leave their retreats, where they exercised a corrupting domination over slaves, and placed them upon a wider theatre, where they have met with equals and superiors. The necessity of association has given rise to the desire to please; the mingling of different conditions has diminished reciprocal prejudices; and the pride of birth has been obliged to bow before the gradations of service. An unlimited despotism, as that of Russia was, could not fail to gain by being converted into a military government, in which authority has its limits.

Hence, in the given circumstances of that

empire, it was difficult to discover a plan of general education which would answer more useful objects.

But in regarding education as an indirect mode of preventing offences, it requires an essential reform. The most neglected class must become the principal object of care. The less parents are able to discharge this duty, the more necessary is it for government to fulfil it. It ought not only to watch over orphans left in indigence, but also over the children whose parents no longer deserve the confidence of the law with regard to this important charge — over those who have already committed crimes, or who, destitute of protectors and resources, are given up to all the seduction of misery. These classes, absolutely neglected in most states, become the hotbeds of crime.

A man of rare benevolence, Le Chevalier Paulet, had formed an establishment at Paris for more than two hundred children, whom he took from among the most indigent class among the beggars. Every thing turned upon four principles:—To offer to the pupils many objects of study and labour, and allow the greatest possible latitude to their tastes;—to employ them in reciprocal instruction, by presenting to the pupil the honour of becoming master in his turn, as the greatest recompense for his progress;—to entrust all the domestic service to them, in order to unite the double advantage of their instruction and economy;—to govern them by themselves, and to place each one under the inspection of one older, in such manner as to render them securities for each other. In this establishment, every thing wore the appearance of liberty and happiness; there were no other punishments than forced idleness, and a change of dress.* The more advanced pupils were as interested in its success as its founder, and every thing advanced towards perfection, when the revolution overwhelmed this little colony amid its public disasters.

Greater extent might be given to institutions of this kind, and they might be rendered less expensive, either by multiplying the number of workmen in them, or by keeping the pupils until the age of eighteen or twenty-one, that they might have time to pay for the expense of their education, and to contribute to that of those who were younger.

Schools upon this plan, instead of costing the state any thing, might become lucrative enterprises. But it would be necessary to interest the pupils themselves in their labour, by paying them nearly the same as free labourers, and by forming for them a saving fund, to be given them when they leave the establishment.

* The two punishments employed were called, one the *little idleness*, the other the *great idleness*. Nothing could be more ingenious than thus giving to punishment itself the name and character of a vice: the salutary association of ideas which results from it, is immediately perceived.

CHAPTER XXI.

GENERAL PRECAUTIONS AGAINST THE ABUSE OF AUTHORITY.

I PROCEED to certain means that governments may employ for the prevention of the abuse of authority on the part of those to whom they confide a portion of their power.

Constitutional law has its direct and its indirect legislation. Its direct legislation consists in the establishment of offices among which all political power is divided; this is not considered in this work. Its indirect legislation consists in general precautions, which have for their object the prevention of the misconduct, the incapacity, or malversation of those who administer these offices, either in chief or in subordination.

A complete enumeration of these indirect methods will not be attempted. It is here only intended to direct attention towards this object, and perhaps to lessen the enthusiasm of certain political writers, who having caught a glimpse of one or other of these methods, have flattered themselves that they have established a science of which they have not even drawn the outline.

1. *Divide Power into different Branches.*

Every division of power is a refinement suggested by experience. The most natural plan, that which first presents itself, is that which places power altogether in the hands of a single individual. Command on the one side, obedience on the other, is a species of contract, the terms of which are easily arranged when the governor has no associate. Among all the nations of the east, the frame of government has preserved this primitive structure. The monarchial power descends without division from stage to stage, from the highest to the lowest, from the Great Mogul to the simple Havildar.

When the king of Siam heard the Dutch ambassador speak of an aristocratic government, he laughed at the idea as an absurdity.

This principal method is only indicated here: to examine into how many branches the power of government may be divided, and which of all the possible divisions deserves to be preferred, would be to write a treatise upon a political constitution. I only observe that this division ought not to form separate and independent powers: this would introduce anarchy into a state. An authority must be recognised, superior to all others, which receives no law, but only gives it, and

which remains master even of the rules themselves which it imposes upon its manner of acting.

2. *Distribute the particular Branches of Power, each among different copartners — Advantages and Disadvantages of this policy.*

In the provinces of Russia, before the regulations of Catherine II., all the different branches of power, military, fiscal, judicial, were placed in a single body, a single council. So far, the constitution of these subordinate governments sufficiently resembled the form of oriental despotism; but the power of the governor was a little limited by the powers of the council; and in this respect the form approached an aristocracy. At present, the judicial power is separated into many branches, and each branch is shared between many judges, who exercise their functions conjointly. A law, of the nature of the *habeas corpus* in England, has been established, for the protection of individuals against arbitrary power, and the governor has no more right to injure than a governor of Jamaica or Barbadoes.

The advantages of this division are principally these:—

1. It diminishes the danger of precipitation.
2. It diminishes the danger of ignorance.
3. It diminishes the danger from want of probity.

This last advantage can only be the constant result when the number of copartners is large; that is to say, when it is such that it would be difficult to separate the interests of the majority from the interests of the body of the people.

The division of powers has also its disadvantages, because it causes delays and foments quarrels, which may produce the dissolution of the government. It is possible to obviate the evil of these delays, by graduating the division according as the functions to which it is applied admit of more or less of deliberation. The legislative power and the military power form, in this respect, the two extremes, the first admits the greatest deliberation, and the second requires the greatest celerity. Whilst, as to the dissolution of the government, it is only an evil on one or the other of these two suppositions:—1*st*, That the new government is worse than the old; 2*d*, That the passage from the one to the other is marked by calamities and civil wars.

The greatest danger in plurality, either in a tribunal or an administrative council, is, that it diminishes responsibility in many ways. A numerous body may reckon upon a kind of deference on the part of the public, and may allow itself to perpetrate injuries which a single person would not dare to do. In a confederation of many persons, the single individuals may throw the odium of a measure upon the others: it is done by all, it is acknowledged by none. Does public censure rise against them? the more numerous the body, the more it is fortified against external opinion; the more it tends to form a kingdom within a kingdom—a little public, having a peculiar spirit, and which protects by its applause those of its members who have incurred general disgrace.

Unity, in all cases in which it is possible, that is, in all cases which do not require the combined knowledge and wills of many, as in a legislative body—unity, I say, is desirable, because it makes the whole responsibility, whether moral or political, to rest upon a single head. It divides with no one the honour of its actions; it bears, at the same time, the whole weight of the blame; it sees itself set against all, with no other support than integrity of conduct, no other defence than general esteem. When the individual is not honest from inclination, he becomes so in opposition to himself, in virtue of the position in which his interest is inseparable from his duty.

Besides, unity in the subordinate person employed, is a certain means for enabling the sovereign to discover, in a short time, the real capacity of individuals. A false and limited mind may hide itself for a long time in a numerous company; but if it act alone upon a public theatre, its insufficiency is soon unmasked. Men of mediocrity or inefficiency, always ready to seek for places where they may shelter themselves under the merit of others, will be afraid to expose themselves in a dangerous career, in which they will be reduced to their own value.

But it is possible to unite, in certain cases, the advantages which result from combination, and those which necessarily belong to the responsibility of an individual.

In subordinate councils, there is always an individual who presides, and upon whom the principal reliance is placed. Associates are given to him, that he may profit by their advice, and that there may be witnesses against him when he neglects his duty. But it is not necessary, for the accomplishment of this object, that they should be his equals in power, nor that they should have a right of voting; all that is necessary is, that the chief should be obliged to communicate to them all that he does, and that each one should make a declaration in writing respecting each of his acts, testifying his approbation or blame.—Such communication, in ordinary cases, ought to be made before an order is given; but in those which demand particular celerity, it would be sufficient if made immediately after. This arrangement could not fail in general to obviate the danger of dissensions and delay.*

* This is the plan adopted by the East India Company. Formerly it was the Council of Ma-

3. *Place the power of Displacing in other hands than the power of Appointing.*

This idea is borrowed from an ingenious pamphlet, published in America in 1778* by a deputy of the Convention, charged with examining the form of government proposed for the State of Massachusetts.

The pride of man is interested in not condemning his own choice. Independently of all affection, a superior will be less disposed to listen to complaints against one of his own nominees, than he would be against an indifferent person, and will have a prejudice arising from self-love in his favour. This consideration serves in part to explain those abuses of power so common in monarchies, when a subaltern is charged with great authority, for which he has only to render an account to the same individual who appointed him to his office.

In popular elections, the part that each individual has in the nomination of a magistrate is so small, that this kind of illusion hardly exists.

In England, the choice of the ministers belongs to the king; but the parliament can effectively displace them, by forming a majority against them. This, however, is only an indirect application of this principle.

4. *Suffer not Governors to remain long in the same Districts.*

This principle particularly applies to considerable governments, in distant provinces, especially when separated from the principal body of the empire.

A governor armed with great power may, if leisure be given him, seek to establish his independence. The longer he remains in place, the more he may strengthen himself, by creating a party, or by uniting himself with a previously existing party. From oppression towards some, and partiality for others, though he may have no party, he may render himself culpable by a thousand abuses of authority, without any one daring or seeking to complain to the sovereign. The duration of his power gives birth to hopes or fears, which are equally favourable to him. He makes some his creatures, who regard him as the sole distributor of favours; whilst those who suffer, fear lest they should suffer more, if they offend a chief whom they have no hope to see changed for many years.

This will be true, especially with regard to offences which are more hurtful to the state than to individuals.

The disadvantage of rapid changes is, that it removes a man from his employment when he has acquired knowledge and experience as to its business. New men are liable to err through ignorance. This inconvenience will be palliated by the institution of a subordinate and permanent council, which would continue the progress and routine of affairs. What you gain by this means, is the diminution of a power that may be turned against you: what you risk, is the diminution of the degree of knowledge. There is no equality between these two dangers, when revolt is apprehended.

The arrangement ought to be permanent, to avoid giving umbrage to individuals. It is proper to accustom the minds of men to regard the change as fixed and necessary at determinate periods. If it take place only in certain cases, it may serve to provoke the evil it is destined to prevent.

The danger of revolt on the part of governors, only exists in feeble and ill-constituted governments. In the Roman empire, from the time of Cæsar to Augustus, nothing else is seen but governors and generals raising the standard of independence. It was not that this means of which we speak was neglected: changes were frequent: but either they knew not how to make a good use of this preservative, or they wanted vigilance and firmness, or, from other causes, they knew not how to hinder the frequency of revolt.

The want of a permanent arrangement of this nature is the most evident cause of the continual revolts to which the Turkish empire is subject, and nothing more completely proves the stupidity of this barbarous court.

Among the European governments which have stood in need of this policy, may be mentioned Spain in her American colonies, and England in the East Indies.

In the better civilized Christian states, nothing is more uncommon than the revolt of a governor. That of prince Gagarin, the governor of Siberia, under Peter I., is, I believe, the only example which can be cited in the last two centuries; and this happened in an empire which has not even yet lost its Asiatic character. The revolutions which have burst forth, have owed their origin to a more powerful and more reputable principle — the opinions, the sentiments of the people, the love of liberty.

5. *Renew the Governing Body by Rotation.*

The reasons for not allowing a governor to remain long in office, all apply, with still more force, to a council or a body of directors.

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dras or Calcutta which decided every thing by a plurality of votes. At present, the Governor ought to consult the Council, and each member ought to give his opinion in writing; but they have no vote—they are simply advisers: the Governor decides every thing in the last resort. Consequently, it is not sufficient for him to gain a majority in the Council, to elude the responsibility which rests altogether upon him.

* Reprinted in *Almon's Remembrancer*, No. 84, p. 223.

Render them permanent: if they agree among themselves, with regard to the generality of their measures, it is probable that, among these measures, there are many whose object is to serve themselves and their friends, at the expense even of the community which has confided its interests to them. If they divide, and are afterwards reconciled, it is highly probable that the price of their reunion will still be at the expense of the community. But, on the contrary, if you remove a certain number at a time, and there are abuses, you have a chance of seeing them reformed by the new-comers, whom their associates will not have had time to corrupt. One portion ought always to be left, to continue the current of affairs without interruption: ought this reserved part to be greater or less than the part renewed? If it be greater, it is to be feared that the ancient system of corruption will maintain itself in vigour; if it be less, it is to be feared that a good system of administration may be overturned by capricious innovations; whichever it be, the simple right of removal will scarcely answer the end, especially if the power of replacing belongs to the body itself. This right should never be exercised but upon extraordinary occasions.

Those who have been removed, ought they to be ineligible for ever, or only for a time? If they are ineligible for a time only, it will happen in the end that they will be re-elected, and that the spirit of federation will run its course in the body. If they are ineligible for ever, the community will be deprived of the talents and experience of its most skilful servants. Upon the whole, this species of policy appears only an imperfect substitute for other means which will be hereafter mentioned, and especially for the publicity of all proceedings and all accounts.

This arrangement of rotation has been adopted in England, in the great commercial companies; and, for some years past, it has been introduced into the direction of the East India Company.

This political view is not the only one which has been taken of rotation. It has often been adopted for the simple object of effecting a more equal distribution of the privileges which belong to office.

The great political work of Harrington (Oceana) turns almost entirely upon a system of rotation among the members of government. A man of wit, who does not see the full extent of a science, seizes a single idea, developes it, applies it to all cases, and sees nothing beside it. It is thus that, in medicine, the less the extent of the art is perceived, the more are people inclined to believe in an elixir of life, a universal remedy, a marvellous secret. Classification is useful, for the purpose of directing the attention successively to all the means.

6. *Admit Secret Informations.*

Every one knows, that at Venice secret informations were received. Boxes were placed in different situations about the palace of St. Mark, whose contents were regularly examined by the inquisitors of state. According to these anonymous accusations, it is pretended that certain persons have been seized, imprisoned, sent into exile, and even punished with death, without any ulterior proof. If this were true, there was nothing more salutary and more reasonable than the first part of the institution — nothing more pernicious and abominable than the second. The arbitrary tribunal of the inquisitors has been a reasonable ground of reproach to the Venetian government, which must have been in other respects wise, since it maintained itself for so long a period in a state of prosperity and tranquillity.

It is a great evil when a good institution has been connected with a bad one: all eyes are not able to use the prism which separates them. In what consists the evil of receiving secret informations, even though anonymous in the first instance? Without doubt, it would not be right to hurt a hair upon a man's head upon a secret information, nor to give the slightest uneasiness to an individual; but, with this restriction, why should the advantage which may result from them be lost? The magistrate considers if the object denounced deserve his attention: if it do not deserve it, he disregards the information; in the contrary case, he directs the informer personally to appear. After examining the facts, if he find him in error, he dismisses him, praising his good intentions, and concealing his name; if he have made a malicious and perfidious accusation, his name and accusation ought to be communicated to the party accused. But if his accusation has foundation, judicial proceedings commence, and the informer is obliged to appear and give his depositions in public.

Is it asked, upon what principle an institution of this kind may be advantageous? Precisely upon the same principle that votes are collected by ballot. In the course of the procedure, the defendant ought certainly to be informed who the witnesses are who depose against him; but where is the necessity that he should know them before the process commences? In this last case, a witness who may have any thing to fear from a delinquent, would not expose himself to a certain inconvenience, for the chance of rendering a doubtful service to the public. It is hence that offences remain so frequently unpunished, because individuals will not make personal enemies to themselves, without being sure of serving the public.

This means has been considered under the head of abuses of authority, because it is in

opposition to official persons that its efficacy is most marked; seeing that in this case, the power of the supposed delinquent is one more weight in the scale of dissuasive motives. In this kind of case, the superior having received a warning which puts him upon his guard, may pass by the first offence, and discover the guilty party in the commission of a second.

The resolution to receive secret and even anonymous informations, would be good for nothing, unless publicly known: but once known, the dread of these informations will soon render the occasion of their occurrence most rare, and thereby diminish their number. And whom will this fear affect? only the guilty, and those who intend to become so; for with publicity of procedure, the innocent cannot be endangered, and malice will be confounded and punished.

7. *Introduce the Lot, in requests addressed to the Sovereign.*

When informations reach the Minister only, they may have their use; but to secure their utility, they ought to come to the knowledge of the Sovereign.

Frederick the Great received directly the letters of the lowest of his subjects, and often wrote the answer to them himself. This fact would be incredible, if it were not well attested.

It must not be concluded from this example, that the same thing could be done under all governments.

In England, every one has liberty to present a petition to the King; but the destination of these petitions, delivered at the same moment to a gentleman of the chamber, is proverbial: they furnish curl papers for the maids of honour. It may be believed after this, that such petitions are not frequently presented; but they also are not very necessary in a country in which the subject is protected by the laws, which do not depend for their execution upon the sovereign. There are other means for the private man to obtain information; there are other channels of information for the prince.

It is in absolute monarchies that it is essential to keep a constant communication open between the subject and the monarch. It is necessary for the subject, that he may be sure of protection; it is necessary for the monarch, that he may be sure of being free.

Though the people may be called *canaille*, populace, or what you will, the prince who refuses to listen to the lowest individual of this populace, very far from increasing his power by so doing, in reality diminishes it. From this moment, he loses the faculty of governing by himself, and becomes an instrument in the hands of those whom he calls his servants. He may imagine that he does what he likes — that he determines for himself: but, in fact, it is they who determine for him; for to determine all the causes which a man has for action, is to determine all his actions. He who can neither see nor hear, but as it pleases those who surround him, is subject to all the impulses which they may choose to give him.

To place an unlimited confidence in ministers, is to place an unlimited confidence in the hands of those who have the greatest interest in abusing it, and the greatest facility for so doing.

Whilst, as to a minister himself, the more upright he is, the less need will he have of such confidence: and it may be affirmed without a paradox, that the more he deserves it, the less will he desire to possess it.

The sovereign who cannot read all these petitions, without sacrificing precious time, may have recourse to different expedients for relieving himself from dependence upon those in whom he confides, and assuring himself that they do not withdraw the most important from him. He may take certain ones at hazard; he may have them distributed under different heads, and have them presented without selection. The details of such an arrangement are neither sufficiently important, nor sufficiently difficult to require a particular developement. It is sufficient to have suggested the idea.

8. *Liberty of the Press.*

Listen to all counsel: you may find yourself the better for it; you run no risk of being the worse. This is what good sense says. To establish the liberty of the press, is to admit the counsels of every body: it is true, that on many occasions the public judgment is not listened to before a measure is determined upon, but after it is executed. This judgment, however, may always be useful, either with reference to measures of legislation which may be reformed, or with respect to those of administration which may have to be repeated. The best advice given to a minister alone may be lost; but good advice given to the public, if it serve not upon one occasion, may serve upon another; if it be not employed to-day, it may be employed in future; if it be not offered in a suitable form, it may receive from the hands of another those ornaments which shall make it relished. Instruction is a seed, which, so to speak, must be tried in a diversity of soils, and cultivated with patience, because its fruits are often of slow growth.

This measure is far preferable to that of petitions, as a means of emancipating the sovereign. Whatever may be his discernment in the choice of his ministers, he can only take them from a small number of candidates, whom the chances of birth or fortune present to him. He may therefore reasonably think that there are other men more enlight-

ened than them; and the wider he extends his faculty of knowing and hearing, the more he extends his power and his liberty.

But insolence and drollery may mingle themselves with the manner of giving this advice. In place of confining an examination to measures, its criticisms may extend to persons. And, indeed, how difficult is it to keep these two operations properly separated! How can a measure be censured, without attacking, in some degree, either the judgment or the probity of its author? There is the rock. Hence it is, that the liberty of the press is as rare as its advantages are manifest. It has ranged against it all the fears of self-love. Joseph II. and Frederick II., however, had the magnanimity to establish it. It exists in Sweden; it exists in England: it might exist everywhere, with some modifications, which would prevent its greatest abuses.

If, owing to the habits of the government, or from particular circumstances, the sovereign cannot permit the examination of the acts of his administration, he ought at least to permit the examination of the laws: though he claim the privilege of infallibility for himself, he need not claim it for his predecessors. If he be so jealous of the supreme power as to make every thing respected which has been touched by the sceptre, he might leave open to discussion mere science, principles of right procedure, and subordinate administration.

If the liberty of the press may have its inconveniences, arising from pamphlets and loose sheets being spread among the public, addressed to the ignorant as well as to the enlightened part of a nation, the same reason need not be applied to serious works of greater length — to books which can only have a certain class of readers, and which cannot produce any immediate effect, but which allow time to prepare an antidote.

Under the ancient French regime, it was sufficient that a book of moral science had been printed at Paris, to raise an unfavourable prejudice against it. The instructions of the Empress of Russia to the assembly of deputies were prohibited in France: the style and the sentiments were too popular to be tolerated under the French monarchy.

It is true, that in France, as elsewhere, negligence and inconsistency palliated the evils of despotism. A strange title served as a passport to genius. The rigour of the censorship serves only to drive the trade in books to other nations, and to render the satire which it seeks to suppress only the more severe.

9. *Publish the Reasons and the Facts which serve as the Foundation for the Laws and other Acts of Government.*

This is a necessary link in the chain of a generous and magnanimous policy, and an indispensable accompaniment to the liberty of the press. The one of these institutions is due to the people; the other is due to the government. If the government disdain to inform the nation of its motives upon important occasions, it thereby announces that it depends upon force, and counts the opinion of its subjects for nothing.

The partisan of arbitrary power does not think thus: he does not wish that the people should be enlightened, and he despises them because they are not enlightened. You are not able to judge, he says, because you are ignorant; and you shall always be kept ignorant, that you may not be capable of judging. Such is the eternal circle in which he entrenches himself. What is the consequence of this vulgar policy? General discontent is formed and increased by degrees, sometimes founded upon false and exaggerated imputations, which are believed from want of discussion and examination. A minister complains of the injustice of the public, without thinking that he has not given them the means of being just, and that the false interpretations given of his conduct are a necessary consequence of the mystery with which it is covered. There are only two methods of acting with men, if it be desired to be systematic and consistent: absolute secresy, or entire freedom — completely to exclude the people from the knowledge of affairs, or to give them the greatest degree of knowledge possible — to prevent their forming any judgment, or to put them in a condition to form the most enlightened judgment — to treat them as children, or to treat them as men: a choice must be made between these two methods.

The first of these plans has been followed by the priests of ancient Egypt, by the Bramins in Indostan, by the Jesuits in Paraguay; the second is practically established in England; it is established by law in the United States of America only. The greater number of European governments fluctuate continually between the one and the other system, without having the courage to attach themselves exclusively to either, and never cease placing themselves in contradiction to themselves, by the desire of having industrious and enlightened subjects, and the dread of encouraging a spirit of examination and discussion.

In many branches of administration it would be useless—it might be dangerous, to publish beforehand the reasons which determine measures. It is requisite only to distinguish the cases in which it is necessary to enlighten public opinion, to prevent its going astray; but in matters of legislation, this principle is always applicable. It may be laid down as a general rule, that no law ought ever to be made without a reason either expressly assigned or

For what is a good law, r which good reasons can nust always be a reason, iking a law, since there is cause. But oblige a mi- reasons, and he will be ve good ones: he will be ou base coin, when he is you with a touchstone to

hereby a sovereign may h. If the reasons for his gives them support that His successors will be them from a sentiment Thus the more happiness he has upon his people, the more happi- e secure to his posterity.

10. *Exclude Arbitrary Power.*

"Clotaire made a law," says Montesquieu, "that an accused person should not be condemned without being heard: this proves that a contrary practice prevailed in particular cases, or among a barbarous people." — *Esprit des Lois*, chap. xii.

Montesquieu dared not speak out. Could he have written this passage without thinking of *lettres de cachet* and the administration of the police, such as it was in his time? A *lettre de cachet* might be defined to be — an order to punish without any proof for a fact against which there is no law.

It was in France and at Venice that this abuse reigned with the greatest violence. These two governments, in other respects moderate, have calumniated themselves by this foolery. They exposed themselves to imputations often false, and to the reaction of terror; for these precautions themselves, by inspiring alarm, created danger. Behave yourself well, it is said, and the government will not be your enemy. But how may I assure myself of this? I am hated by the minister, or by his valet, or by his valet's valet. If I am not hated to-day, I may be to-morrow, or some other day — and I may be taken for another person; it is not upon my conduct that I depend, but upon the opinion of men more powerful than me. Under Louis XV., *lettres de cachet* were an article of commerce. If this could happen under a government which passed for gentle, what would it be in countries where manners are less civilized?

In default of justice and humanity, it seems to me that the pride of governments ought to suffice for the abolition of these remains of barbarity.

Lettres de cachet may have been established under the veil of maxims of state: at the present day, this pretence has lost its magic. The first thought which presents itself to the mind is that of the incapacity and weakness of those who employ them. If you dared to hear that accused person, you would not close his mouth; if you keep him silent, it is because you fear him.*

11. *Direct the Exercise of Power by Rules and Forms.*

This is another head of police with regard to subordinate offices, no less applicable to absolute monarchies than to mixed governments. If the sovereign consider himself interested in remaining independent of the laws, he is not interested in communicating this same independence to all his agents.

The laws which limit subordinate officers in the exercise of their power, may be distinguished into two classes: — To the first belong those which limit the causes with regard to which they are permitted to exercise certain powers; to the second, those which determine the formalities with which they shall exercise them. These *causes* and these *formalities* ought to be all specifically enumerated in the body of the law: this being done, the subjects ought to be informed that these are the causes, and these the only causes, for which an attack can be legally made upon their security, their property, their honour. Hence the first law with which a great code ought to be begun, should be a general law of liberty — a law which should restrain delegated powers, and limit their exercise to certain particular occasions, for certain specific causes.

Such was the intention of *Magna Charta*, and such would have been its effect, without that unfortunate indeterminate expression, "Lex terræ," &c.; an imaginary law, which spreads uncertainty over the whole; because, by unceasingly referring to the custom of ancient times, examples and authorities have been sought among the abuses which it was intended to prevent.

12. *Establish the Right of Association; that is to say, of Assemblies of the Citizens for the expression of their sentiments and their wishes upon the public measures of Government.*

Among the rights that a nation ought to reserve to itself, when it institutes a government, this is the principal, as being the foundation of every other. However, it is almost useless expressly to mention it here: the people who possess it, need not to be told to preserve it; and those who do not possess it, have little hope of obtaining it; for what is there which can induce their chiefs to give it them?

At first sight, this right of association

* This does not extend to extraordinary circumstances, similar to those under which the *habeas corpus* act has been suspended in England, with known precautions.

would appear incompatible with government; and I allow, that to consider the right as a means of repressing government would be absurd and contradictory: but the case is very different. If the slightest act of violence be committed by one or many of the members of the association, punish them as if it had been committed by any other individual. If you find that you want the power to punish them, it is a proof that the association has made such progress as it could not have made without just cause; indeed, that it is not an evil, or that it is a necessary evil. I suppose that the government possess a public force, an organized authority, everywhere. If, then, these associations have become so strong as to intimidate it in the midst of all its regular sources of power—if it have not formed associations on its own side, though it possess such superior means for establishing them, it is an infallible sign that the calm and reflecting judgment of the nation is in opposition to such government. This being settled, what reason can be offered for continuing in the same state—for not satisfying the public wish? I cannot find any. Without doubt, a nation, being composed of men, is not infallible: a nation, as well as its chiefs, may be deceived as to its true interests; nothing is more certain: but if the great majority of a nation be found on one side, and its government on the other, may it not be presumed, in the first instance, that this general discontent is founded upon real grievances?

Far from being causes of insurrection, I consider associations as the most powerful means of preventing this evil. Insurrections are the convulsions of weakness, which finds strength in the moments of despair. They are the efforts of men who have not been permitted to express their feelings, or whose projects could not have succeeded, had they been known—of conspirators, who, being opposed to the general feelings of the people, can only succeed by surprise and violence. Those who frame them can therefore only hope for success by means of force; but those who can believe that the people are on their side—those who can flatter themselves with the hopes of triumph through the influence of public opinion,—why should they employ violence? why should they expose themselves to manifest danger without utility? I am therefore persuaded, that men who have full liberty of associating, and who can do so under the protection of the laws, will never have recourse to insurrection, except in those rare and unfortunate cases, in which rebellion is become necessary. Whether associations are permitted or prohibited, rebellions will never break out sooner.

The associations which were openly formed in Ireland, in 1780, produced no evil, but served rather to maintain tranquillity and security in the country; though this country, half civilized, was torn by every possible cause of civil war.

I even believe that associations might be permitted, and become one of the principal means of government, in the most absolute monarchies. These kinds of states are more tormented than others by revolts and risings; every thing is done by sudden movements: associations would prevent disorders. If the subjects of the Roman empire had been in the habit of association, the empire and the life of the emperor would not have been continually sold by auction by the prætorian guards.

Associations, however, cannot be permitted to slaves: too much injustice has been done them, not to afford reason to fear every evil from their ignorance or their resentment. It is not in the West Indies, it is not in Mexico, that the people may be armed and permitted to associate; but there are countries in Europe in which this strong and generous policy might be set up.

It must also be acknowledged, that there is a degree of ignorance which renders associations dangerous: this proves that ignorance is a great evil, and not that associations are not a great good. Besides, this measure itself may serve as an antidote against its ill effects: in proportion as an association gains in extent, being formed in security, all its bases are discovered; the public is enlightened; the government employs every means in disseminating the knowledge of facts, and dissipating errors; freedom and instruction join hand in hand; freedom facilitates the progress of knowledge, and the progress of knowledge represses the wanderings of freedom.

I know not how the establishment of this right can give uneasiness to the government. There is no one which does not fear the people, which does not consider it necessary to consult their wishes, and to accommodate itself to their opinions: the most despotic are the most timid. What sultan is so quiet, so secure in the exercise of his power, as the king of England? The janissaries and the populace make the seraglio tremble: in London, the voice of the people is heard in legitimate assemblies; in Constantinople, it speaks in outrages: in London, the people speak by petitions; at Constantinople, by fires.

The case of Poland may be presented as an objection, in which associations produced so many evils: but this is deceptive; the associations were produced by anarchy, and did not produce it. Besides, in speaking of this means as a restraint upon governments, an established government is supposed—a medicine, and not the daily food, is spoken of.

I observe again, that even in the states in which this right exists, circumstances may

arise, in which it will be proper, not entirely to suspend, but to regulate its exercise. An absolute and inflexible rule is not requisite in this respect. We have seen, in the course of the last war, the British Parliament restraining the right of assembling; not allowing political unions, till the object had been publicly announced, and sanctioned by the magistrates, who possessed the power of dissolving them; and these restrictions taking place at the same time that the citizens were called upon to form military bodies for the defence of the state, and whilst the government announced the noblest confidence in the general spirit of the nation. When these restraints ceased, every thing remained in the same condition: it might have been supposed that the restrictive law continued. It was because a people, secure of its rights, enjoys them with moderation and tranquillity: if it abuse them, it is because it is doubtful of them: precipitation is the effect of fear.

CHAPTER XXII.

MEASURES TO BE TAKEN AGAINST THE ILL EFFECTS OF AN OFFENCE ALREADY COMMITTED — CONCLUSION OF THE SUBJECT.

THE general result of the principles which have been laid down in relation to penal legislation, present a happy prospect and well-founded hopes of reducing the number of crimes, and mitigating punishments. This subject at first only presents to the mind sombre images of suffering and terror; but in considering this class of evils, these doleful sentiments soon give place to gentle and consoling sentiments, when it is discovered that the heart of man has not within it any original and incurable perversity; that the multiplicity of offences arises only from errors in legislation, easy to be reformed; and that even the evil which results from them is capable of being repaired in many ways.

The great problem in penal legislation is—

1. To reduce as much as possible all the evil of offences to that which a pecuniary compensation will cure; 2. To throw the expense of this cure upon the authors of the evil, and, in their default, upon the public. What may be done in this respect goes far beyond what is imagined at the first glance.

The term cure is employed, the individual or community injured being considered under the character of an invalid, who has suffered from a crime. The comparison is just, and indicates the most suitable procedure, without mingling with them popular passions, and the antipathies which the ideas of crime are too apt to awaken among legislators.

There are three principal sources of crime: incontinence — enmity — rapacity.

The crimes to which incontinence gives birth, are scarcely of a nature to be cured by a pecuniary compensation: this remedy may be applied, in certain cases, to seduction, and even to conjugal infidelity; but it never cures that portion of the evil which consists in the attack upon the honour and peace of families.

It may be observed, that in opposition to other offences, whose evil effects are more surely arrested the more completely they are published, the offences of incontinence only become hurtful when made public. Thus a good citizen, who would esteem it a duty to publish an act of fraud, would take care to conceal a secret fault arising from love. To leave a fraud undetected, is to become an accomplice in its success. To publish, in open day, an unknown weakness, is to do an injury without compensation: since it lacerates the sensibility of those who are held up to shame, and repairs nothing. I reckon among the establishments which do honour to the humanity of our age, the secret asylums for accouchements, and hospitals for foundlings, which have so often prevented the evil effects of despair, by covering with the shades of mystery the consequences of a transient wandering. The rigour which rises up against this indulgence is founded upon a false principle.

The crimes to which enmity gives birth are often such, that a compensation in money cannot be applied to them. Even this compensation, when it can be applied, is rarely complete: it cannot undo what is done; it cannot restore a limb which is lost; it cannot restore a son to his father, a father to his family: but it may act upon the condition of the party injured: it may furnish him with a lot of good, in consideration of a lot of evil; and in balancing the account of his prosperity, place an *item* upon the favourable side, to balance an *item* upon the disadvantageous side.

The most essential observation with respect to these offences is, that they are daily diminishing, from the progress of civilization. It is wonderful to observe, among the greater number of European states, how few crimes are produced by the angry passions so natural to man, and so violent in the infancy of society. How noble an object of emulation for those tardy governments, which have not yet attained this degree of police, and among whom the sword of justice has not yet vanquished the stilettoes of revenge!

But the inexhaustible source of crimes is *rapacity*. Here is an enemy always active, always ready to seize all advantages—against whom it is necessary to wage continual war. This war demands tactics, whose particular principles have been much misunderstood.

Be indulgent to this passion, so long as it confines itself to attacking you by peaceful

means; attach yourself to taking away all the unjust profit that it makes; become severe with regard to it, in proportion as it carries on its enterprises openly — when it has recourse to threats and violence. Still, however, reserve means of additional severity, when it gives way to atrocities, such as murder and incendiarism. It is in the proper management of these gradations, that the art of penal legislation consists.

It must never be forgotten, that all penal police consists in a choice of evils. The wise administrator of punishments will always have the balance in his hands; and in his zeal for the exclusion of small offences, will not imprudently give birth to greater ones. Death is almost always a remedy which is not necessary, or which is inefficacious: it is not necessary with respect to those whom an inferior punishment may deter from crime — whom simple imprisonment can restrain from it: it is not efficacious with respect to those who precipitate themselves upon it, so to speak, as an asylum against despair. The policy of the legislator who punishes every thing with death, resembles the pusillanimity of the child who crushes the insect which he dares not look upon. But if the circumstances of society—if the frequency of a great crime, require the employment of this terrible punishment, dare, without aggravating the torments of death itself, to give to it a more formidable aspect than that of nature; surround it with mournful accessaries — the emblems of crime, and the pomp of tragic ceremonies.

Be hard, however, to be convinced of the necessity of putting any one to death. By avoiding it as a punishment, you will also prevent its occurrence as a crime. When a man is placed between two crimes, it is important to give him a sensible interest not to commit the greater. It is proper, in a word, to convert the assassin into a pickpocket; that is to say, to give him a reason for preferring the crime which can be repaired, to that which cannot be repaired.

Everything which can be repaired is nothing. Everything which may be compensated by a pecuniary forfeiture, is almost as non-existent as if it had never existed; for if the injured individual always receive an equivalent compensation, the alarm caused by the crime ceases entirely, or is reduced to its lowest term.

The desirable object is, that the funds for compensation on account of crimes should be drawn from the mass of delinquents themselves — either from the goods they have acquired, or from labour imposed on them. If this were the case, security would be the inseparable companion of innocence, and sorrow and anguish would only be the portion of the disturbers of the social order. Such is the point of perfection which should be aimed at, though there may be no hope of attaining it but by degrees, and by continued efforts. The goal is pointed out: the happiness of reaching it will be the reward of an enlightened and persevering administration.

During the insufficiency of this source, it is proper to draw compensation, either from the public treasure or private insurances.

The imperfection of our laws is very evident, under this point of view. Has a crime been committed? those who have suffered by it, either in their person or their fortune, are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them, however, an indemnity, when its protection has not been effectual.

When an individual has prosecuted a criminal at his own expense, even in his own cause, he is no less a defender of the state than he who fights against foreign enemies: the losses he experiences in defending the state ought to be compensated at the public expense.

But when an innocent person has suffered from an error of the tribunals—when he has been arrested, detained, rendered suspected, condemned to all the anxieties of a trial and a long captivity, it is not only on his own account, but on account of justice itself, that he ought to receive an indemnity. Instituted for the redress of wrongs, is it desirable that the wrongs they perpetrate should be without redress?

Governments have not provided for either of these indemnities. In England some voluntary associations have been formed to supply them. If the institution of assurance* be good in a single case, it is good in all, under the precautions requisite for the prevention of negligence and fraud.

The inconvenience of frauds is common to all funds, public and private. They may diminish the utility of assurances, without destroying it. Shall no fruit-trees be cultivated, because the crop may be destroyed by

* Assurance is good, because the assurer is prepared to sustain the loss, and considers the premium he has received as the equivalent for the risk which he runs.

But this remedy is imperfect in itself, because it is always necessary to pay the premium, which is a certain loss, in order to guarantee one's self against an uncertain loss. In this point of view, it is to be desired that all unforeseen losses which can fall upon individuals without their fault, were covered at the public expense. The greater the number of contributors, the less sensible is the loss for each one.

It must be observed on the other side, that a public fund is more exposed to fraud and waste than the funds of individuals. Losses which fall directly upon individuals give the greatest possible force to the motives to vigilance and economy.

a thousand accidents? Banks of piety have succeeded in many countries. An establishment of this kind, formed in London in the middle of the past century, failed at its commencement, from the unfaithfulness of its directors; and this robbery has left a prejudice, which has hindered all other attempts of this kind. According to the same logic, it might be proved that ships are bad war machines, because the Royal George, whose port-holes were left open, sunk whilst at anchor.

Assurances against crimes might have two objects:—1. To create a fund for the indemnification of parties injured, in case the delinquent were unknown or insolvent; 2. To defray, in the first instance, the expenses of judicial prosecution; and might even be extended, in favour of the poor, to causes purely civil.

But the method of settling these indemnities would be foreign to the present subject: it has been treated of elsewhere. I confine myself here to an enunciation of the general result of this work: It is, *That by good laws almost all crimes may be reduced to acts which may be repaired by a simple pecuniary compensation;* and that, when this is the case, *the evil arising from crimes may be made almost entirely to cease.*

This result, simply announced, does not at first strike the imagination: it is necessary to meditate upon it, in order to perceive all its importance and solidity. The brilliant society of the world cannot be interested by a formula almost arithmetical: it is to statesmen that it is presented as a subject for consideration; and it belongs to them to judge of it.

The science, whose foundations we have explored, can only please those elevated minds with whom the public good is a passion. This is not a subversive and shuffling policy, which prides itself upon clandestine projects—which builds its glory upon misfortunes—which beholds the prosperity of one nation in the abasement of another, and mistakes the convulsions of government for the conceptions of genius. It has reference to the greatest interests of humanity—to the art of forming the manners and characters of nations—to the means of insuring the highest degree of security to individuals—and of deriving results equally advantageous from different forms of government. Such is the object of this noble and generous political science, which seeks only to be known—which desires nothing exclusive—and which knows no more certain method of perpetuating its benefits, than sharing them among all the great family of nations.

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